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No. .....

In the Supreme Court of the United States

OCTOBER TERM, 1983

WILLIAM T. BOSTON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Where there was massive and pervasive pre-trial publicity surrounding the Oklahoma County Commissioner kickback scandal investigation and trials, and where prospective jurors admitted having been exposed to some pre-trial publicity, did the Trial Court have a constitutional duty to examine each prospective juror individually to determine what each juror had heard or read and how it might affect their ability to be fair and impartial?

2. In a mail fraud, kickback prosecution of an Oklahoma County Commissioner, are the mailings of warrants (checks) to vendors as payment for materials purchased by the County, criminal under the Federal Mail Fraud Statute, when the mailings are made or caused to be made under the Imperative Command of Duty imposed by State Law?

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I. In holding that the Voir Dire conducted by the trial court adequately protected Petitioner's Constitutional right to be tried by a panel of fair and impartial jurors, the Tenth Circuit Court of Appeals, in effect, decided an important Federal Constitutional question which has not been, but should be, settled by this Court, to-wit: In Federal criminal cases, where there has been massive and pervasive pre-trial publicity, and where prospective jurors admit having been exposed to some pre-trial publicity, does the Constitution, specifically, the Due Process Clause and the Sixth Amendment right to a fair and impartial jury trial, require the trial court to individually examine each prospective juror who admits being being exposed to pre-trial publicity, concerning the nature and extent of their exposure to pre-trial publicity, or, can the trial court simply rely on the juror's assurances that he can be fair and impartial? 8

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No. .....

In the
Supreme Court of the United States
OCTOBER TERM, 1983

WILLIAM T. BOSTON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioner, William T. Boston, requests that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in this case on September 30, 1983.

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit was published and appears at 718 F.2d 1511 (1983), and appears in Appendix A of this Petition. No opinions were rendered by the trial court.

JURISDICTION

The Petitioner is seeking a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit in order to review a judgment entered on September 30, 1983. A timely Petition for Rehearing was denied by the United

States Court of Appeals for the Tenth Circuit on February 17, 1984. Jurisdiction is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

1. The United States Constitution, Amendment V, provides, in pertinent portion:

> ". . . No person shall be . . . deprived of life, liberty, or property, without due process of law . . ."

2. United States Constitution, Amendment VI, provides, in pertinent portion:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of . . . district wherein the crime shall have been committed . . ."

3. Title 18 U.S.C. § 1341 provides, in pertinent portion:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the postal service . . . or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000.00 or imprisoned not more than five (5) years or both."

4. Title 18 U.S.C. § 1951 provides, in pertinent portion:

(a) "Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or

commodity in commerce by robbery or extortion . . . shall be fined not more than $10,000.00 or imprisoned not more than twenty (20) years, or both.

(b) "The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right."

5. 19 O.S. § 3 provides, in pertinent portion:

"The powers of a county as a body politic and corporate shall be exercised by its Board of County Commissioners . . ."

6. 19 O.S. § 347 provides, in pertinent portion:

". . . All warrants upon the County Treasurer for a County purpose shall be issued upon the order of the Board of County Commissioners, drawn by the County Clerk, signed by the Chairman of the Board, and attested by the signature of the County Clerk, with the County Seal attached. Each warrant shall designate the fund, department and appropriation account, and shall further show the nature of the indebtedness acknowledged by the allowance of the claim so paid. . ."

STATEMENT OF THE CASE

A. *Procedural Background of the Case*

Petitioner was indicted and charged with Fifty (50) Counts of Mail Fraud and Seven (7) Counts of Extortion, in violations of 18 U.S.C. § 1341 and 1951, respectively. The Government dismissed Two (2) Counts of Mail Fraud prior to trial and the trial court dismissed One (1) Count on its own motion after trial. Following jury trial, Petitioner was convicted on Forty-Seven (47) Counts of Mail Fraud and Seven (7) Counts of Extortion and was sentenced to nine (9) years imprisonment and fined $48,600.00.

Petitioner perfected an appeal to the United States Court of Appeals for the Tenth Circuit. Petitioner argued, among other things, that the Voir Dire conducted by the trial court was inadequate to ascertain whether each juror could be fair and impartial in light of the massive and pervasive pre-trial publicity surrounding the Oklahoma County Commissioner Kickback scandal. The Petitioner further argued that the routine mailing of county warrants, made under the imperative command imposed upon County officials by state law, could not be for the purpose of executing the scheme to defraud as alleged. Finally, Petitioner argued that the trial court expanded the indictment and allowed the jury to convict him on charges not contained in the indictment by instructing the jury on the depletion of assets theory of interstate commerce.

The United States Court of Appeals for the Tenth Circuit affirmed the Petitioner's conviction on all but Three (3) of the Mail Fraud Counts and all of the extortion Counts. A copy of the Opinion of the United States Court of Appeals for the Tenth Circuit is attached hereto as Appendix A.

The Petitioner herein timely petitioned the United States Court of Appeals for the Tenth Circuit for a rehearing in his case. A copy of Petitioner's Petition for Rehearing in the United States Court of Appeals for the Tenth Circuit is attached hereto as Appendix B. The United States Court of Appeals for the Tenth Circuit denied the Petitioner's Petition for Rehearing and a copy of said denial is attached hereto as Appendix C.

B. ***Relevant Facts Material to a Consideration of Questions Presented***

At the time of his indictment, Petitioner was a County Commissioner for Major County, State of Oklahoma. Each County in the State of Oklahoma is divided into three (3) districts and each district elects a Commissioner. Collectively, they are known as the Board of County Commissioners and act as the governing and managing body of their respective counties.

Petitioner's indictment was the result of a statewide, ongoing Federal investigation into alleged corrupt practices by County Commissioners in the State of Oklahoma. The indictment charged Petitioner with accepting cash kickbacks from vendors or sellers of road and bridge building equipment and supplies. Federal jurisdiction was premised on the theory that the mailing of the warrants or checks as payment for the equipment and supplies was in furtherance of the scheme to defraud.

The Government also charged Petitioner with affecting or attempting to affect interstate commerce by extortion. The indictment charged the Petitioner with obtaining money not lawfully due him or his office under color of official right from the same vendors and sellers. Federal jurisdiction for the Hobbs Act Counts was premised on the fact that the vendors sometimes purchased materials from out of state sources. It was not expressly stated in the indictment how the Petitioner affected or attempted to affect interstate commerce. However, the trial court instructed the jury on the depletion of assets theory of affecting interstate commerce, over Petitioner's objection.

Prior to trial, Petitioner requested the trial court to individually examine each prospectve juror. In support of that request, Petitioner attached several newspaper articles which contained information concerning the progress of the ongoing Federal investigation into the alleged corrupt practices of County Commissioners and vendors in the State of Oklahoma. Before asking the prospective jurors whether they had been exposed to any pre-trial publicity, the trial court acknowledged that the ongoing investigation had received considerable publicity. In fact, according to a scientific poll attached by Petitioner to his request for individual examination of jurors, only six (6) per cent of those polled said they had not heard of the Federal kickback investigation and sixty-three (63) per cent of those polled believed that corruption was widespread among County Commissioners in the State of Oklahoma.

Petitioner submitted several proposed Voir Dire questions which were not asked by the trial court. These questions were designed to probe into the extent and depth of each prospective juror's exposure to the massive and lengthy publicity surrounding the Oklahoma County Commissioner Kickback scandal and investigation. However, the trial court limited its inquiry into the area of pre-trial publicity by simply asking the jurors if they had read or heard anything about the County Commissioner investigation, and if so, would they be able to put aside what they had read or heard and give Petitioner a fair trial. The trial court also asked the jurors whether they had expressed an opinion concerning the ongoing investigation or whether anyone they had confidence and trust in expressed an opinion concerning the matter that could have influenced them.

The Voir Dire of the trial court did result in two (2) jurors admitting they had formed an opinion which they thought would take some evidence to remove. However, the remaining jurors told the trial court there was nothing that would prevent them from serving as fair and impartial jurors.

In order to prove the allegations of mail fraud in the indictment, the Government relied upon the testimony of several vendors or sellers that the Petitioner had done business with during his tenure as County Commissioner of Major County. Although the details of their testimony varied, each one testified that they paid cash kickbacks to the Petitioner whenever he purchased equipment or materials from them. The kickback was always paid in cash and was usually based upon a percentage of the total sales price of the particular order. However, before the seller could receive payment on an item sold to the County, the entire Board of County Commissioners had to approve the purchase and authorize the County Clerk to issue a warrant or check as payment for the purchase. The testimony at trial showed that all warrants issued by Major County were mailed to the various vendors for payment of materials purchased.

Additionally, several of the vendors or representatives of their company testified that they purchased items sold to Petitioner from sources outside the State of Oklahoma. The amount of purchases made from out of state sources fluctuated with each witness, but each witness testified that they purchased items from companies located outside the State of Oklahoma and that kickbacks were paid to Petitioner on sales of equipment and materials which were purchased from out of state sources.

REASONS FOR GRANTING THE WRIT

I. IN HOLDING THAT THE VOIR DIRE CONDUCTED BY THE TRIAL COURT ADEQUATELY PROTECTED PETITIONER'S CONSTITUTIONAL RIGHT TO BE TRIED BY A PANEL OF FAIR AND IMPARTIAL JURORS, THE TENTH CIRCUIT COURT OF APPEALS, IN EFFECT, DECIDED AN IMPORTANT FEDERAL CONSTITUTIONAL QUESTION WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT, TO-WIT: IN FEDERAL CRIMINAL CASES, WHERE THERE HAS BEEN MASSIVE AND PERVASIVE PRE-TRIAL PUBLICITY, AND WHERE PROSPECTIVE JURORS ADMIT HAVING BEEN EXPOSED TO SOME PRE-TRIAL PUBLICITY, DOES THE CONSTITUTION, SPECIFICALLY, THE DUE PROCESS CLAUSE AND THE SIXTH AMENDMENT RIGHT TO A FAIR AND IMPARTIAL JURY TRIAL, REQUIRE THE TRIAL COURT TO INDIVIDUALLY EXAMINE EACH PROSPECTIVE JUROR WHO ADMITS BEING EXPOSED TO PRE-TRIAL PUBLICITY, CONCERNING THE NATURE AND EXTENT OF THEIR EXPOSURE TO PRE-TRIAL PUBLICITY, OR, CAN THE TRIAL COURT SIMPLY RELY ON THE JUROR'S ASSURANCES THAT HE CAN BE FAIR AND IMPARTIAL?

In order to properly answer this question, it will be necessary to review the present constitutional standards of fairness and impartiality, then address the reasons why the Constitution requires an inquiry into the nature and extent of a juror's exposure to pre-trial publicity in highly publicized cases notwithstanding an assurance by the prospective juror that he can be fair and impartial.

It has long been the rule that a criminally accused is entitled to a fair trial by a panel of impartial, "indifferent" jurors. *Irvin* v. *Dowd*, 366 U.S. 717, 81 S.Ct. 1639, 6th L. Ed.2d 751 (1961). "In the language of Lord Coke, a juror

must be as 'indifferent as he stands unsworne.'" Co. Litt. 155b. *Irvin*, 366 U.S. at 722, 81 S.Ct. at 1642. Today's communication industry has made it much more difficult to find Lord Coke's ideal juror. It is more the norm than the exception that a highly publicized, important criminal case can arouse not only the interests of the public in the vicinity of the trial, but the entire nation as well. This court has therefore recognized that jurors do not have to be totally ignorant of the facts and issues involved. On the contrary, the court said in *Irvin* that in important cases, "scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case." 366 U.S. at 722, 81 S.Ct. at 1642.

Standing alone, that is not sufficient to rebut the presumption of a prospective juror's impartiality. The test to determine a juror's impartiality is whether the juror "can lay aside his impression or opinion and render a verdict based on the evidence presented in court." 366 U.S. at 723, 81 S.Ct. at 1643.

It is the duty of the trial court in the first instance to determine whether a juror can be fair and impartial. In fulfilling that duty, the trial court must determine the nature and strength of any opinion or impression formed by a porspective juror and then decide whether the strength of that opinion is such as in law to necessarily raise the presumption of partiality. The question thus presented to the trial court is one of mixed law and fact. *Reynolds* v. *United States*, 98 U.S. 145, 25 L.Ed. 244 (1878). The finding of the trial court upon that issue should not be set aside by a reviewing court unless the error is manifest. *Reynolds*, 98 U.S. at 154, 25 L.Ed. at 246.

This court has heretofore refrained from setting any specific rules or standards for a trial court to follow in making his determination of a juror's impartiality. In *United States* v. *Wood*, 299 U.S. 123, 57 S.Ct. 177, 81 L.Ed. 78 (1936), Chief Justice Hughes stated "impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attidue of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula."

Although there are no specific rules or guidelines which a trial court must follow, he still has a constitutional duty to protect an accused's constitutional rights to due process and a fair and impartial jury trial by assessing each prospective juror's ability to be fair and impartial. The focus of Petitioner's narrow argument in this case is that in cases involving o.going, massive and pervasive pre-trial publicity, such as the instant Oklahoma County Commissioner Kickback scandal and investigation, the trial court cannot simply rely on a juror's assurances that he can be fair and impartial, especially when the juror admits to having heard or read about the matter being inquired into. Petitioner contends that the failure of a trial court to inquire into the extent of a juror's exposure to pre-trial publicity does not satisfy the requirements of the Due Process Clause or the Sixth Amendment guarantee to a fair trial by a panel of impartial and indifferent jurors for the reason that the trial court cannot fulfill his constitutional duty to determine the strength of a prospective juror's opinion or impression without first making inquiry into the factual basis for that juror's impression or opinion.

This court has said in dicta that "the juror's assurances that he is equal to this task cannot be dispositive of the accused's rights, and it remains open to the defendant to demonstrate the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality." *Murphy* v. *Florida*, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed. 2d 589 (1975).

And in *Irvin*, the court said "no doubt each juror was sincere when he said that he would be fair and impartial to Petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father." 366 U.S. at 728, 81 S.Ct. at 1645.

Petitioner contends that a defendant cannot show the existence of an opinion in the mind of a juror that would raise the presumption of partiality without first knowing what information concerning his particular case a juror has been exposed to. Indeed, several of the lower circuits, in varying degrees, disapprove of relying on a juror's assurances of impartiality. A survey of the circuit courts done by the Sixth Circuit in *United States* v. *Blanton*, 700 F.2d 298 (6th Cir. 1983), vacated, 703 F.2d 981, shows that at least four (4) circuits, the Second, Fifth, Ninth and Eleventh, believe that in cases where pre-trial publicity raises a significant possibility of prejudice, a juror's assurance of impartiality is insufficient. 700 F.2d 304-305 (Citations therein omitted). The Sixth Circuit also found that two (2) other circuits, the First and the District of Columbia Circuit, have stated in strong language, albeit in dicta, that a juror's assurances of impartiality are insufficient. 700 F.2d 304-305 (Citations therein omitted).

Petitioner therefore contends that the Constitution requires that the trial court, in order to determine the percentage of veniremen who have a preconceived opinion, *Murphy*, 421 U.S. at 803, 95 S.Ct. at 2037, and in order to test the strength of that opinion, must in cases of pervasive publicity, inquire into the depth of the individual talesman's exposure to the publicity.

Petitioner contends that before the trial court can answer the factual portion of the mixed question of law and fact, he must make himself aware of the nature and extent of the juror's exposure to pre-trial publicity. Common sense tells us that people's opinions and impressions are based on what they see, hear and read. Merely knowing that someone has seen, read or heard about something does not give one enough information to evaluate the strength of that person's opinion on the subject matter. However, once the nature and extent of that person's exposure to the subject matter is learned, then a more intelligent evaluation and determination of the strength of that person's opinion on the subject matter can be had.

Unless and until a trial court makes inquiry into the nature and extent of a juror's exposure to pre-trial publicity, he cannot properly evaluate a juror's assurances that, despite having admitted being exposed to some of the pre-trial publicity, he can nonetheless be fair and impartial. Unless a trial court makes that inquiry, Petitioner contends the trial court fails to fufill its duty to protect a defendant's constitutional right to a jury trial before a panel of fair and impartial jurors for the reason that the court would have insufficient facts before it on which to make a determination as to the strength of the juror's opinion. Putting it simply,

a trial court cannot evaluate or determine the strength of somebody's opinion unless and until the trial court makes itself aware of the facts which form the basis of that juror's opinion. The Constitution requires the trial court to make that determination, therefore the Constitution must also require the trial court to have sufficient information before it when he makes that determination. The only way this can be done is for the trial court to conduct an inquiry into the nature and extent of a prospective juror's exposure to pre-trial publicity.

In the instant case, Petitioner submitted numerous newspaper articles concerning the ongoing, statewide Federal investigation into the Oklahoma County Commissioner Kickback scandal. Admittedly, Petitioner's name does not appear in any of the articles submitted. However, the Petitioner submitted evidence of a scientific survey which indicated that the vast majority of the people in the State of Oklahoma thought that corruption was widespread throughout the State in the Office of the County Commissioners in the State of Oklahoma. Petitioner contends that the article was prejudicial not only to him but to any person on trial for an offense which arose out of the Federal investigation. Common sense again tells us that when the public has been saturated with news of guilty pleas, resignations and indictments of County Commissioners and suppliers throughout the State of Oklahoma, that it is not necessary for an individual to be singled out in a newspaper item before the possibility of prejudice to him exists.

Despite all that, the trial court, in conducting Voir Dire, only asked the jurors whether or not they had heard or read of the ongoing investigation into County Commis-

sioners. When almost all of the prospective jurors responded that they read or heard of the investigation, the trial court simply asked them whether or not they could lay aside what they had read or heard and base their opinion on the evidence presented in open court. Petitioner contends that although each juror was probably sincere when they said they could be fair and impartial, that the psychological impact which required that declaration before the fellow jurors was the father of that declaration.

Petitioner contends that the trial court committed a fundamental error when it refused to inquire into the nature and extent of each juror's exposure to the pre-trial publicity. Since the trial court did not have adequate information before it to fulfill its constitutional duty to assess the strength of juror's opinions and impressions, or to assess whether or not a juror had even formed an opinion or had an impression of the case, the trial court failed in its constitutional duty to assure the Petitioner of due process and did not uphold his right to a fair trial before a panel of impartial, indifferent jurors.

II. THE TENTH CIRCUIT COURT OF APPEALS' HOLDING THAT THE MAILINGS OF THE WARRANTS WERE FOR THE PURPOSE OF EXECUTING THE SCHEME TO DEFRAUD IS IN DIRECT CONFLICT WITH THIS COURT'S DECISION IN *PARR* v. *UNITED STATES*, 363 U.S. 370, 80 S.Ct. 1171, 4 L.Ed.2d 1277 (1960).

To demonstrate this argument, Petitioner will analyze his case similar to the way this Court analyzed the *Parr* case by examining the indictment, the evidence adduced and the issues of fact tried and submitted to the jury.

As noted earlier the indictment charged Petitioner with devising a scheme to defraud the citizens of Major County of their right to have said county's business conducted honestly and impartially, free from corruption and undue influence. The substance of the scheme was that Petitioner, in his official capacity as County Commissioner, would order and purchase materials and supplies from various vendors listed in the indictment. That it was further a part of said scheme that Petitioner, as a member of the Board of County Commissioners, would vote to approve said purchases, thereby causing the County Clerk's Office to encumber funds and thereafter send a county warrant to the vendor as payment for the materials supplied. The indictment further alleged the warrants were sent through the United States Mails. To complete the scheme, the vendor would pay Petitioner a kickback in cash in return for Petitioner's doing business with the particular vendor. The indictment alleged that the mailings of the warrants as payment for the materials purchased were for the purpose of executing the scheme to defraud and the government relies on these mailings to establish federal jurisdiction.

The indictment charged Petitioner with 50 counts of mail fraud. Several counts adopted by reference allegations of other counts and merely changed the warrant number, amount of money paid and date of mailing.

The evidence at trial showed Petitioner, as one of three (3) County Commissioners in Major County, was, among other things, responsible for building and maintaining roads and bridges in his district. To carry out this duty, he was required to purchase equipment, materials and supplies.

During the times relevant to Petitioner's indictment, county governments in Oklahoma were required to follow a certain procedure when purchases involving expenditure of county funds were made. Specifically, the Board of County Commissioners (the three (3) member governing body of the county) would advertise for bids on road and bridge building and maintenance materials and supplies. Those interested in doing business with the county were required to submit a written bid, listing the prices they will charge for certain items over a six (6) months period of time. The bids are opened at a public, open meeting and are received and kept by the County Commissioners and County Clerk's office. The lowest and best bid is the one accepted and all purchases for the next six (6) months must be made at that bid price. However, the county is free to purchase from any vendor so long as they meet the low bid price.

The procedure for procuring heavy equipment is somewhat different. In Oklahoma, counties cannot borrow money nor can they purchase items if there aren't sufficient funds

an hand. Most Oklahoma counties did not have enough cash on hand to purchase heavy equipment such as bulldozers and motor graders. Therefore, they utilized the lease-purchase method to acquire those items.

In a lease-purchase agreement, the county would lease a piece of equipment from a vendor. The vendor would then go to a local bank and assign the lease-purchase agreement to the bank. The bank would pay the full purchase price to the vendor and the county would then make lease payments by warrant to the bank. This procedure allowed the county to possess and use the equipment and at the same time keep its payments low enough to be affordable. In certain counts, the Government relied on the mailing of a warrant to a bank to establish federal jurisdiction.

The Government's case featured the testimony of several vendors of road and bridge building materials and supplies. Each testified that they paid Petitioner a kickback each time he, as County Commissioner, ordered and purchased materials, supplies or equipment from the vendor's company. The kickback was always paid in cash. For obvious reasons, there were never any witnesses to the exchange. The amount of kickback paid varied with each purchase, but was usually four (4) to ten (10) per cent of the purchase price of the particular order.

On pieces of heavy equipment, the kickback was not based on a percentage of the purchase price. The witnesses testified that they would reach an agreement with Petitioner on the amount to be paid. Every vendor, however, testified the kickback was paid after the warrants were mailed to them by the county.

The warrants which the indictment charged were "caused" by Petitioner to be placed in the mail were all offered and received in evidence. Each warrant contained the name of the payee, the amount of payment, the date and the signatures of the Chairman of the Board of County Commissioners, attested by the signature of the County Clerk.

To see what theories and issues of fact were submitted to the jury for their resolution, the charge to the jury must be reviewed. Relative to the Mail Fraud Counts, the trial court, after reading the indictment to the jury, read the statute and defined certain terms in the statute. There was no specific verdict-directing charge as cited in *Parr*, supra. After reading the statute and stating the elements of the offense, the trial court gave this charge to the jury:

> "It is not necessary for the government to prove in this case that any person was actually defrauded by the scheme. What must be proved beyond a reasonable doubt is that the accused knowingly and wilfully devised a scheme to defraud substantially the same as the scheme alleged in the indictment and that the use of the United States Mail was closely related to the scheme in that the accused either mailed or caused it to be mailed in an attempt to execute or carry out the scheme . . ."

In essence, the trial court instructed the jury that if they believed the Petitioner committed the acts alleged in the indictment and then used the mails or caused the mails to be used "in an attempt to carry out the scheme", they should find him guilty.

Petitioner objected to the Mail Fraud Charge and submitted the following requested instructions:

"The law requires the act of using or causing the use of the United States Mails to be for the purpose of executing the scheme to defraud. If the mails are used merely as a result of the scheme, then such use of the mails is not for the purpose of executing such scheme as required by the federal mail fraud statute."

"A mailing of a lawful county warrant made or caused to be made under the imperative command of duty imposed by state law is not for the purposes of executing a scheme to defraud as required by the federal mail fraud statute, even though the person required to do the mailing plans to steal or receive some of the proceeds of the warrant after it is mailed."

"If you find from the evidence that certain lawful county warrants were mailed or caused to be mailed by the defendant, but that the defendant or some other person was legally compelled to mail or cause to be mailed the lawful county warrants, then such mailings are not made for the purposes of executing a scheme as required by the federal mail fraud statute."

The indictment charged and the evidence tended to show the Petitioner over a period of several years defrauded the taxpayers of Major County to their right to have county government run openly and honestly by accepting bribes in return for doing business with certain vendors. But Petitioner contends that accepting a kickback is essentially a state crime (*See* Anti Kickback Act of 1974, 74 O.S. § 3404), and could become violations of the Mail Fraud Statute only if the mailings of the warrants were in execution of the alleged kickback scheme.

Petitioner's position is virtually identical to that taken by the Petitioners in *Parr*, supra. Oklahoma law establishes the Board of County Commissioners as the governing

body of the county. 19 O.S. § 3. The purchases made for materials and supplies were not illegal or unlawful. They were made pursuant to the statutory duty imposed on the commissioners. The warrants sent to the vendors were for the same amount as the invoice submitted to the county. There was some evidence that suppliers who paid kickbacks "padded" their bids or built the kickback into the bid, but the evidence failed to show that Petitioner ever bought any item at an "inflated" price. Additionally, no such "padded invoice" theory was submitted to the jury.

Once an invoice was approved by the Board of County Commissioners, State law required the Board to order a warrant to be "issued" as payment for that invoice. 19 O.S. § 347. The only practical way to get the warrant to the vendor was through the United States Mail. Thus, Petitioner contends he was legally compelled to cause the warrants to be issued and mailed. Therefore, Petitioner contends the statutory method of payment triggered the use of the mails, and that the mails were therefore not made for the purpose of executing the scheme to defraud. Warrants were issued as payment for all claims upon the county. The mails were used whether a kickback was paid or not. Although the mails may have been used as a result of the scheme, that is not sufficient to say the mails were used for the purpose of executing the scheme to defraud. *United States* v. *Maze*, 414 U.S. 395, 94 S.Ct. 645, 38 L.Ed. 2d 603 (1974).

The Tenth Circuit Court of Appeals held that Petitioner's reliance on *Parr* was misplaced "because it necessarily rests on his view of the vendors as outsiders rather than as the participants they were. *United States* v. *Prim-*

rose, 718 F.2d 1484 (1983). The Court of Appeals stated that *Parr* was inapplicable because the scheme included the vendor's receipt of county business as well as the receipt of kickbacks and that although Primrose was required to purchase materials and supplies, he was not required to purchase from those who paid kickbacks. Id. at 1491. The court then concluded, "In sum, causing the mails to be used so that the county would pay the vendors who had paid kickbacks constitutes a violation of the Mail Fraud Statute . . . The warrants mailed . . . were each in furtherance of the fraud within the meaning of the Mail Fraud Statute." *Ibid.* The Court of Appeals adopted this rationale in Petitioners case, 718 F.2d at 1517, 1518.

Petitioner strongly contends that the Court of Appeals has fundamentally misconstrued this Court's holding. The focus of the *Parr* decision seems to be that the mailings were not triggered by the scheme to defraud, but were made pursuant to a duty imposed upon the Petitioners by state law. The mailings in the instant case were also caused to be made by the statutory scheme for payment of county claims. As noted earlier, warrants were required to be issued as payment for all claims against the county. Thus, the mails were used for the purpose of fulfilling Petitioner's statutory duty rather than for the purpose of executing a scheme to defraud.

The Court of Appeals apparently reasoned that the mailings here were not legally compelled because the warrants were sent to those who paid kickbacks to Petitioner and it was illegal for Petitioner to accept kickbacks. Thus, the particular mailings, the Court of Appeals states, were

not duty bound and were only made to carry out the steps in the scheme to defraud.

The Court of Appeals apparently relied on the dicta in *Parr*, appearing at 363 U.S. 387, 80 S.Ct. at 1121, wherein this Court stated:

> "But petitioner's counsel concede that if such secretary, clerk or cashier—or similarly a member of a School Board—improperly 'pads' or increases the amounts of the statements and causes them to be mailed to bring in a fund to be looted, such mailings, not being those of the employer (or School Board), could not be duty bound or legally compelled and would constitute an essential step 'for the purpose of executing (a) scheme to defraud.'"

However, the Court of Appeals overlooks the fact that the issuance of the warrants resulted from the purchases made by Petitioner, none of which were charged or shown to have been unlawful.

In other words, the warrants would have been mailed regardless of the payment or receipt of a kickback. Just as in *Parr*, the mailings were to be made regardless of whether the Petitioner embezzled the money sent in.

If Petitioner had "padded" the amount of the warrant to create a "fund to be looted" or had paid an "inflated" price for the specific item, then *Parr* would be inapplicable. However, this issue was not charged in the indictment nor was it submitted to the jury. Admittedly, some vendors testified that bids were "padded" because of kickbacks, but the record does not show Petitioner caused a single warrant to be mailed that could be said to be payment for any materials or supplies that were bought at an inflated price.

Petitioner would adopt the argument made by petitioner's counsel in *Parr*, 363 U.S. at 387, 80 S.Ct. at 1181, wherein counsel for petitioner pointed out what would be the " 'explosively expanded and incongruous results . . . (by) making federal mail fraud cases out of the conduct of a doctor's secretary or a business concern's billing clerk or cashier in mailing out, in the course of duty, the employer's lawful statements with the design, eventually executed, of misappropriating part of the receipts.' " The Court stated it was "happily" not called upon to determine those analogies.

Petitioner's case fits in that scenario. The county can be looked at as a business concern. The warrants are checks which, like any business, a county must send out to pay for goods purchased. They are, in fact, required by state law to issue warrants. The Government seeks to make a federal mail fraud violation out of the mailing of a check as payment for goods delivered. The payment of the kickback is not related to the mailing of the warrant. At best, the warrants are mailed as a *result* of the scheme, but not for the purpose of executing the scheme, *Maze*, supra, for the reason that it cannot be said that warrants mailed or caused to be mailed under the imperative command of duty imposed by state law are criminal under the mail fraud statute, even though those required to do the mailing take a kickback from the vendor when or after the warrant is cashed.

CONCLUSION

The Constitution mandates that every criminal accused receives a fair trial from a panel of impartial jurors. A trial court has a constitutional duty to empanel such a jury. In fulfilling that duty, he must evaluate and assess each juror's sworn assurances that he can be impartial and that he can base his verdict only on the evidence presented in court.

When there has been massive, statewide pre-trial publicity surrounding the subject matter of the trial, and that is properly brought to the trial court's attention, the trial court should ask the jurors whether they have read or heard anything about the subject matter of the trial. If a juror indicates he has, the trial court, in order to perform his constitutional function should, before evaluating that juror's assurance that he can be impartial, test the strength of any opinion or impression that juror has formed as a result of his exposure to pre-trial publicity. Only then can the trial court properly evaluate a juror's ability to be impartial. Without knowing what publicity a juror has been exposed to, the trial court has to rely solely upon a juror's assurance he can be fair and impartial. However, if the trial court or defense counsel knew that juror had read about the subject matter of the trial every day for the past six (6) months, that person's assurance of impartiality would not be accorded so much weight and the defense may have a proper challenge for cause. However, if the trial court does not attempt to find out what information a juror has been exposed to, he does not uphold his constitutional duty to evaluate the strength of a juror's opinion

and also impairs the right of the defense to make a challenge for cause.

Today's communications industry brings the events surrounding trials of important people and issues into the homes of practically every person in the vicinity of the trial, and sometimes into the homes of the entire nation. When cases are highly publicized, it makes the task of selecting a fair and impartial jury a difficult one. However difficult it may be, though, the Constitution still requires that it be done.

There is a trend in the Circuit Courts of Appeals to not rely solely upon a juror's assurance that he can be fair and impartial in highly publicized cases. The Constitution requires the trial court to test the strength of a veniremen's opinion or impression. The Constitution should require a trial court, in highly publicized cases, to inquire of the juror, if he admits exposure to pre-trial publicity, the nature and extent of his exposure to pre-trial publicity. Then the trial court can properly evaluate the juror's assurance that he can be fair and impartial.

In Petitioner's case, the subject matter of his trial, the Oklahoma County Commissioner Kickback scandal, had been the subject of extensive media coverage. The trial judge noted in open court that publicity had been considerable. Yet he failed to make proper inquiry into each juror's exposure to pre-trial publicity, only asking them if they had read or heard of the investigation and if they could then put that aside and base their ruling on the evidence in court. This is the type of questioning most Circuits have said was insufficient.

Petitioner respectfully requests this Court to hold that the trial court has the constitutional duty to inquire into the nature and extent of a juror's exposure to pre-trial publicity in cases involving massive and pervasive pre-trial publicity and to reverse his convictions for the trial court's failure to do so in his case.

This Court has held that mailings which are made or caused to be made under the imperative command of duty imposed by state law are not for the purpose of executing a scheme to defraud. The rationale seems to be that it is the state law, and not the scheme, that triggers the use of the mail, and federal jurisdiction should not be invoked in cases where the use of the mails is, in effect, compelled by law or made pursuant to a billing procedure of a business. In those cases, the use of the mails is only a result of, or collateral to, whatever scheme is alleged. It would be different if the mailings involved padded or unlawful warrants or invoices. However, in Petitioner's case, no such issue was charged or submitted to the jury.

The analysis of the Tenth Circuit Court of Appeals is in direct conflict with this Court's holding in *Parr*. Purchases would be made and warrants would be mailed to those vendors whether kickbacks were paid or not. It does not matter that Petitioner was going to get a kickback from certain vendors. The law still required a warrant to be issued when a lawful purchase was made. Since the purchase itself was lawful and since the purchase, not the kickback, triggered the use of the mails, Petitioner contends this

Court should reverse his convictions on the mail fraud counts.

Respectfully submitted,

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APPENDICES

APPENDIX A

[Filed Sept. 30, 1983]

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	
v.	)	No. 82-1323
WILLIAM T. BOSTON, Defendant-Appellant.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA
D.C. No. CR-82-15-E)

Gene Stipe of Stipe, Gossett, Stipe, Harper & Estes, McAlester, Oklahoma (Anthony M. Laizure was also on the brief) for Defendant-Appellant

Susie Pritchett, Assistant United States Attorney, Oklahoma City, Oklahoma (William S. Price, United States Attorney, Oklahoma City, Oklahoma, was also on the brief) for Plaintiff-Appellee

Before HOLLOWAY, McWILLIAMS and SEYMOUR, Circuit Judges

HOLLOWAY, Circuit Judge

Defendant-appellant William T. Boston brings this timely appeal from his conviction on seven counts of extortion in violation of the Hobbs Act, 18 U.S.C. § 1951, and forty-seven counts of mail fraud in violation of 18 U.S.C.

§ 1341 and 18 U.S.C. § 2.[1] The charges against Boston alleged that he engaged in a practice of taking "kickbacks," *i.e.*, bribes, from sellers of equipment and supplies that Boston purchased in his capacity as County Commissioner of Major County, Oklahoma. Both the extortion and the mail fraud charges were based directly on Boston's acceptance of kickbacks. The extortion counts accused Boston of using his office to extract payments from seven different suppliers. The various mail fraud counts alleged that the mails were used in individual purchases from the seven suppliers for which kickbacks were paid.

Boston's indictment was part of a comprehensive effort by the F.B.I., the I.R.S. and the United States Attorneys for Oklahoma to eliminate alleged corruption in purchasing practices of county commissioners throughout Oklahoma. The Hobbs Act counts were based on charges of obtaining money "under color of official right." *See United States* v. *Hall*, 536 F.2d 313, 320 (10th Cir.), *cert. denied*, 429 U.S. 919 (1976). The mail fraud counts were premised on allegations of defendant's having defrauded the citizens of the County of their right to have the County's business conducted honestly and impartially. *See United States* v. *Mandel*, 591 F.2d 1347, 1362 (4th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980).

Each of the seven suppliers testified at the trial after having made an agreement with the government to cooperate in the investigation and subsequent prosecutions. In exchange the government agreed to permit the seven witnesses to plead guilty to one count of conspiracy to commit mail fraud and to evade taxes. In each case the single conspiracy count was to cover all kickback transactions, so the suppliers were relieved of the threat of numerous prosecutions based on their individual transactions.

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[1] Boston was originally charged with fifty counts of mail fraud. Two counts were dismissed before trial, and the District Court dismissed one count after trial.

In general, the suppliers testified that they paid kickbacks because they did not think they had a chance to compete for contracts with the commissioners if they did not. On some occasions the amount of the kickback would be negotiated before the sale. Frequently, especially when the supplier had dealt with a commissioner before, there would be a tacit understanding that a kickback in an amount equal to a certain percentage (ranging from five to fifteen per cent) would be forthcoming. Boston participated in transactions following both of these patterns. Some suppliers initiated the bribes because they believed it necessary to do so, but others said they paid a kickback only when the county official involved asked for it.

The actual payment of the kickback always occurred after the purchase had been completed and the payment therefor was made. Payments were made by warrants, *i.e.*, drafts or checks, which were mailed to the vendors. At some convenient time after receiving the county's payment the supplier would meet privately with Boston and pay the kickback in cash. The bribes were often paid while Boston and the supplier were alone in a car; frequently trips to road construction sites and other locations were made in order to make the payoff in the seclusion of the car on a country road.

In his defense Boston offered the testimony of several witnesses who described his excellent reputation in the community, and that of several vendors who had dealt with Boston and who testified that Boston had never solicited or accepted kickbacks from them. A former I.R.S. agent testified that he had examined Boston's tax returns and other financial papers and had found no evidence of unreported income. Boston also testified himself, denying that he had ever accepted any kickbacks.

For reversal, defendant Boston claims error in that: (1) the trial court erroneously instructed the jury on a depletion of assets theory which was not charged in the

indictment; (2) the evidence on the extortion counts failed to establish the nexus with interstate commerce required by the Hobbs Act; (3) the trial court's *voir dire* was inadequate to test the jurors' impartiality in light of the massive, inflammatory pretrial publicity, and the court erred in not individually questioning each juror; and (4) the routine mailings of county warrants, made or caused to be made under a duty imposed by state law, were not in execution of the alleged scheme to defraud.

I

On the extortion counts under the Hobbs Act, the government offered testimonial evidence that Boston's demands for kickbacks reduced the assets available to the vendors or to Major County. The court then instructed the jury that such evidence could support a finding of an effect on interstate commerce, a necessary element of an offense under the Hobbs Act.[2] Boston now contends that the trial court erred in giving this instruction, arguing that the instruction broadened the charges against him, thus constituting an improper amendment of the indictment.

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[2] The Hobbs Act provides, in pertinent part:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (b) As used in this section—
>
> • • •
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

18 U.S.C. §1951 (1976).

The instructions presented the jury with three alternative grounds for finding the required effect on commerce. See Part II *infra*.

Boston relies on *Stirone* v. *United States*, 361 U.S. 212 (1960), in which the Supreme Court reversed a conviction under the Hobbs Act because the prosecution was allowed to show, and the jury was instructed concerning, an effect on commerce different from the specific obstruction of commerce alleged in the indictment. The indictment had charged that Stirone used his influence as a labor union official to extort money from Rider, who supplied concrete for the construction of a steel-processing Plant in Pennsylvania. The indictment specifically referred to Rider's importation of sand into Pennsylvania for use in his concrete business. At trial, however, the government, over Stirone's objection, offered evidence that commerce was affected because the steel plant would ship its product interstate. The jury was instructed, again over Stirone's objection, that the requisite connection with interstate commerce could be established either by a finding that Rider used sand that was brought into Pennsylvania from another state or by a finding that Rider's concrete was used to construct the mill which would manufacture steel goods to be shipped in interstate commerce. The Court held that this variance between the indictment and the proof required reversal of the conviction because "a court cannot permit a defendant to be tried on charges that are not made in the indictment against him." 361 U.S. at 217.

Boston's reliance on *Stirone* is misplaced. There the Court observed:

> [W]hen only one particular kind of commerce is charged to have been burdened a conviction must rest on that charge and not another, even though it be assumed that under an indictment drawn in general terms a conviction might rest upon a showing that commerce of one kind or another had been burdened.

361 U.S. at 218. We think it clear that in the instant case the indictment was drawn in general terms so that the contention that the indictment was, in effect, amended is erroneous. We are convinced that the indictment charging

the Hobbs Act offenses was not defective and that there was no variance in the proof or instructions so that Boston's convictions under the Act might rest on charges not made by the grand jury, in violation of his Fifth Amendment right to indictment by grand jury. *See Stirone, supra; Russel* v. *United States*, 369 U.S. 749, 770-71 (1962); *United States* v. *Radetsky*, 535 F.2d 556, 562 (10th Cir.), *cert. denied*, 429 U.S. 820 (1976).

The indictment must inform the accused of the nature of the crime charged and its basis so that he may prepare his defense and it must protect the accused against subsequent prosecution for the same offense. *See United States* v. *Herbst*, 565 F.2d 638, 643 (10th Cir. 1977). Boston does not claim that the indictment here was inadequate for the latter purpose, nor could such an argument fairly be made. The record clearly identifies the transactions on which the convictions are based, and the entire record, not just the indictment, may be referred to in order to protect against double jeopardy if a subsequent prosecution should occur. *United States* v. *Levine*, 457 F.2d 1186, 1189 (10th Cir. 1972).

Nor was the indictment defective for failure to allege the essential elements of offenses under the Hobbs Act. We are persuaded that it is not necessary for the indictment in a Hobbs Act case to allege the exact nature of the interference with commerce. *See Carbo* v. *United States*, 314 F.2d 718, 732-33 (9th Cir. 1963), *cert. denied*, 377 U.S. 953 (1964); *United States* v. *Barna*, 442 F.Supp. 1232 (M.D. Pa.), *aff'd mem.* 578 F.2d 1376 (3d Cir.), *cert. denied*, 439 U.S. 862 (1978); *United States* v. *Frumento*, 405 F.Supp. 23, 30 (E.D. Pa. 1975), *aff'd mem.* 559 F.2d 1209 (3d Cir. 1977); *United States* v. *Quinn*, 364 F.Supp. 432, 437-38 (N.D. Ga. 1973); *United States* v. *Malinsky*, 19 F.R.D. 426, 427-28 (S.D.N.Y. 1956). The general allegations that defendant knowingly, willfully, and unlawfully attempted "to obstruct, delay or effect (sic) commerce and the movement of articles and commodities in commerce, as the term com-

merce is defined in [the Hobbs Act] by extortion," I R. 1-2, were sufficient. Under the general allegations made in the indictment, the evidence advanced and the issues submitted to the trial jury were not a fatal variance as in *Stirone*.

We also believe that Boston had ample notice from the indictment of the acts for which he was to be tried. *See United States* v. *Tomasetta*, 429 F.2d 978, 979 (1st Cir. 1970) ("question is whether the indictment as a whole conveys sufficient information to properly identify the conduct relied upon by the grand jury in preferring the charge"). The convictions were not based on facts outside the scope of the indictment as was the case in *Stirone*. *United States* v. *Hyde*, 448 F.2d 815, 838-39 (5th Cir. 1971), *cert. denied*, 404 U.S. 1058 (1972).

We conclude, therefore, that the instant case is distinguishable from Stirone and that defendant Boston's rights were not infringed as he claims.

Boston next argues that the government's evidence failed to establish sufficient interference with interstate commerce to constitute a violation of the Hobbs Act. Authorities are not presented to support the argument and we find it unpersuasive.

The language of the Hobbs Act specifically proscribes interference "*in any* way or *degree* . . . by robbery or extortion." 18 U.S.C. § 1951(a) (1976) (emphasis added). As the Supreme Court observed in *Stirone*, "[the Hobbs] Act speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion . . . ." 361 U.S. at 212. Although this is apparently the first time the issue has been before this court, several other circuits have held that the clear language of the Act makes any *de minimus* effect on commerce sufficient to sustain federal jurisdiction. *See, e.g., United States* v. *Glynn*, 627 F.2d 39, 41 (7th Cir. 1980); *United States* v. *Harding*, 563 F.2d 299, 301-302 (6th Cir. 1977), *cert. denied*, 434 U.S. 1062 (1978). The circuits

also are in agreement that evidence of depletion of assets may establish the requisite effect on commerce. *See, e.g., United States* v. *Boulahanis*, 677 F.2d 586, 589-90 (7th Cir.) (citing cases) *cert. denied*, 51 U.S.L.W. 3378 (1982); *United States* v. *Zemek*, 634 F.2d 1159, 1173 n.20 (9th Cir. 1980), *cert. denied*, 450 U.S. 916, 985, 452 U.S. 905 (1981); *United States* v. *French*, 628 F.2d 1069, 1075-78 (8th Cir.), *cert. denied*, 449 U.S. 956 (1980); *United States* v. *Daley*, 564 F.2d 645, 649-50 & n.4 (2d Cir. 1977), *cert. denied*, 435 U.S. 933 (1978). We agree with these interpretations of the Hobbs Act.

In the instant case the jury was instructed that the government was required to prove that Boston "actually or potentially obstructed, delayed or affected interstate commerce or attempted to do so." I R. 263. With respect to this element of the offense, the court further said that (I R.264):

> you are instructed that while it is not necessary to prove that the defendant specifically intended to interfere with interstate commerce, or attempted to do so, it is necessary as to this issue that the government prove that the natural consequences of the acts or attempted acts alleged in the indictment would be to delay interrupt or affect "interstate commerce," which means the flow of commerce or business activities between two or more States.

The district court then informed the jurors that they could find that the government had met its burden of proof on this element if it had proved any of the following: (1) that the vendor was engaged in interstate commerce and depletion of the vendor's assets would be the natural consequence of the alleged extortion; (2) that Major County was engaged in interstate commerce and that a depletion of its assets would be a natural consequence of the alleged extortion; or (3) that the vendor purchased supplies from outside the State of Oklahoma which were then brought

into the State and delivered to Major County as a result of the alleged extortion. I R. 264-65.

We find no error in the charge with respect to the alternative theories for finding obstruction of commerce. And under the standard required by the trial judge, the government's evidence was sufficient.

The trial transcript first reveals that as to each extortion count except Count 48 the government showed that the victim sold materials that had moved in interstate commerce. This was established as to Counts 16, 50, 52 and 54 by the testimony of the vendors (*see* Tr. 230, 407, 376, 491), who were, respectively, McReynolds, Dudly Williams, Hicks and Davis. Allred, who made the payment charged in Count I, obtained supplies from two Oklahoma companies. Employees of these suppliers testified that their goods originated outside Oklahoma. Tr. 279-80 (testimony of Donna Shelby), 287-88 (testimony of Harold Huffman). A fellow employee of salesman Detrick, the vendor in Count 29, testified that that company, Thurman Bridge & Block Company, obtained most of its goods from out-of-state sources.

From this evidence the jury could find that the government had satisfied its evidentiary burden by way of the first alternative presented in the instruction if the jury also concluded that depletion of the victim's assets was a natural consequence of the extortion. Such a conclusion can be drawn from the evidence as a whole, and with respect to Counts 1, 16, 29, 52 and 54, there was explicit testimony that such depletion had occurred. Tr. 138, 227, 301, 376, 484. The failure to offer such explicit evidence on Count 50 is of no consequence since the jury easily would have been justified in drawing this conclusion. This leaves only Count 48. As to this count, there was direct evidence that the county's assets were depleted by the kickback. Tr. 445. There is ample evidence that Major County was involved in interstate commerce, purchasing substantial amounts of goods that originated outside Oklahoma. There-

fore, under the second option presented by the instruction, the jury's finding is clearly supported by the evidence.

In sum, the evidence of the required effect on commerce was sufficient to sustain the verdicts under the instructions.

III

We next consider Boston's contentions that the *voir dire* examination conducted by the trial court was inadequate and that the judge erred in not individually questioning the prospective jurors outside the presence of the jurors.

We have studied the record carefully and find that the circumstances here are similar to those in *United States* v. *Whitt*, *No.* 82-2213, ... F.2d .. .. (10th Cir. 1983), filed this date. Most of the pretrial publicity, like that in *Whitt*, concerned the county commissioner scandal in general, although a number of jurors had read articles or parts of them discussing defendant Boston himself. The same judge presided over the Whitt trial and the instant case, and his *voir dire* procedure in the two cases was similar. He followed a comparable pattern of asking general questions regarding the potential jurors' exposure to pretrial publicity, followed by individual questions to jurors whose responses aroused concern, and he also asked basic questions propounded in most cases such as possible acquaintance with parties or their counsel. On the basic reasoning and authorities set out in *Whitt*, we conclude that there was no reversible error in the conduct of the *voir dire* in defendant Boston's trial.

IV

Our anlaysis of defendant Boston's remaining argument is similarly guided by our decision this date in another case arising from the investigation of the Oklahoma County commissioners. Defendant Boston argues that the use of the mails in the kickback scheme was not integral to the operation of the plan and so was not sufficient to invoke federal jurisdiction under 18 U.S.C. § 1341. We considered

similar contentions in *United States* v. *Primrose*, No. 82-1842, F.2d (10th Cir. 1983), filed this date. On the facts in that case we concluded that the use of the mails was sufficient to bring the case within the purview of § 1341.

In the instant case the government has relied solely on the mailing of the county warrants to the vendors to bring the scheme within the reach of the federal statutes, while in *Primrose* some counts were based on the mailing of warrants and some on the mailing of invoices. *Primrose* also included proof that some invoices were mailed with "no kick-back" affidavits attached. Here we reach the same conclusion as in *Primrose*, based on the proof of the mailing of warrants.

While in *Primrose* the evidence was that kickbacks usually were paid before the warrants were mailed, the opposite was the norm in this case. Therefore, the argument, made in *Boston* as in *Primrose*, that the mailings occurred after completion of the scheme is obviously meritless here.

Boston relies almost exclusively on *Parr* v. *United States*, 363 U.S. 320 (1960), and the argument that the mailings were, in effect, compelled by state law. We rejected that argument in *Primrose*, slip op. at 13-15, and must reject it here also.

Accordingly, with the exception of the counts discussed in Part V, *infra*, the mail fraud convictions must be affirmed.

V

Finally, in reviewing this record we have concluded that the convictions on three counts must be reversed. On Count 49, one of the mail fraud counts, the exhibit relied on to establish the payment by the county through the mails shows explicitly that the warrant was not mailed but was delivered in person. V R. Exhibit 5-49-A. Hence this conviction is defective.

On Counts 29 and 33, alleging mail fraud in accepting kickbacks from supplier Bobby Detrick, Detrick's testimony was that he was fairly certain that he had *not* paid a kickback on those transactions. Tr. 299-301. The testimony indicated that Detrick had reviewed the exhibits prior to trial and that in the process of doing so had noticed these two transactions particularly. He testified that these purchases were of supplies on which, for unspecified reasons, kickbacks probably would not have been paid. (There was testimony that vendors' margin of profit on some items would be too low to pay a ten percent kickback, but Detrick did not say clearly why he would not have paid kickbacks on these purchases.) The evidence, even when viewed in the light most favorable to the government, clearly is insufficient to sustain the convictions on these two counts. *See United States* v. *Wright*, 450 F.2d 992, 993-94 (10th Cir. 1971).

VI

In conclusion, we have found Boston's claims of error to be without merit. Accordingly, the convictions on all counts are affirmed, except the convictions on Counts 29, 33 and 49, which are reversed.

APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	
VS.	)	NO. 82-1323
WILLIAM T. BOSTON, Defendant-Appellant.	)	

PETITION FOR REHEARING

COMES NOW the Appellant, and Petitions this Court for a Rehearing. In support of his Petition for Rehearing, Appellant would point out to the Court that it has apparently overlooked or misconstrued certain arguments raised by Appellant in his Appeal.

Concerning the examination of prospective jurors, this Court held that the Voir Dire conducted by the Trial Court to test the Jurors' impartiality was not an abuse of discretion and that the nature of the publicity in the County Commissioner cases did not mandate greater care than was taken so as to insure impartiality. The Court seemed to place emphasis on the fact that none of the articles explicitly dealt with the Appellant alone, and thus distinguish this case from the *Silverthorne* case cited by Appellant in his Brief.

Appellant contends that it was not necessary for the Pre-Trial publicity to be focused on him alone. The thrust and gist of the Pre-Trial publicity as evidenced by the newspaper articles made part of the record was that there was massive and widespread corruption among County Commissioners and suppliers in the State of Oklahoma. In fact, the scientific survey submitted into the record by the Appellant, indicated that over ninety-four (94) per cent

of the people in the State of Oklahoma were aware of the Federal investigation into County Commissioner kickbacks and that over sixty-two (62) per cent of the people of the State of Oklahoma felt that there was widespread corruption among County Commissioners. This information alone should have put the Trial Court on notice that there would be people on the prospective Jury Panel with pre-formed opinions. Yet the Trial Court failed to conduct a very searching Voir Dire to discover whether there were any persons on the Panel with pre-formed opinions. The Trial Court, as does this Court, concluded that the Voir Dire was sufficient because each Juror assured the Court that they could be fair and impartial.

The Court has thus overlooked the thrust of the holding in the recent case of *United States* v. *Blanton*, 700 F.2d 298 (6th Cir. 1983). The *Blanton* case was incorporated into all the County Commissioner briefs and arguments by way of subsequent letter to this Court. The Sixth Circuit concluded from a survey of cases from nearly every Circuit that perhaps not so much deference should be given to a Juror's assessment of his own impartiality. The *Blanton* case involved a public figure and substantial Pre-Trial publicity, as does the instant case. As in the instant case, the Trial Court in *Blanton* failed to inquire into the nature and extent of the Jurors' exposure to Pre-Trial publicity. The Court found that the Voir Dire conducted by the Trial Court was not sufficient to determine the percentage of the veniremen who had a preconceived opinion and was further insufficient to determine the strength of the opinions, despite the assurances by the Jurors that they could be fair and impartial.

Appellant contends that the assurances of a Juror that he can be fair and impartial should not be afforded much deference in cases of substantial Pre-Trial publicity. That at a minimum, a Trial Court should at least inquire into the extent and sources of a Juror's exposure to Pre-Trial publicity. Only then will Counsel for Defendants be able to

adequately assess a Juror's impartiality, and then intelligently exercise pre-emptory challenges and challenges for cause.

Appellant contends that his case was a proper one for a more searching Voir Dire. He was a County Commissioner in the State of Oklahoma at the time of Trial. There had been widespread and massive publicity about the Federal investigation into the so called kickback scandal involving County Commissioners in the State of Oklahoma. Evidence was introduced through Pre-Trial Motions that a majority of the people in the State of Oklahoma thought there was widespread corruption among County Commissioners. The fact that the Appellant was not named specifically in these articles should not be determinative of this issue, for the reasons heretofore cited.

WHEREFORE, the Appellant respectfully requests this Court to grant a Rehearing on the issue of adequacy of the Trial Court's Voir Dires so that he may further advance the arguments cited in this Petition for Rehearing.

Appellant further contends that this Court has misconstrued the Supreme Court's holding in the *Parr* case. The Court distinguishes *Parr* from the instant case apparently because the persons who did the mailing in *Parr* were not participants in the scheme. The Court states that the Appellant's reliance on *Parr* is misplaced because it rests on his view of the vendors as outsiders rather than as participants in the scheme. The Court states that if the scheme is properly viewed as including the vendor's receipt of County business as well as the Appellant's receipt of kickbacks, then the analogy to *Parr* breaks down, yet the Court fails to state why this is so.

Appellant contends that the *Parr* case is applicable to the instant case for the reason that the mailings in each instance are only incidental or collateral to the scheme, and not for purposes of executing the alleged scheme. The offenses involved in *Parr* and the instant case are of the type

that should be dealt with by appropriate State law. They involve local officials misappropriating local funds. The mails are not used to further the scheme to defraud nor are they used to delay the detection of the scheme to defraud. The fraud is executed when the County Commissioner and the vendor meet and agree that a kickback should be paid. That meeting of the minds is the gist of the offense. How that fraud is achieved or carried out is only a collateral matter. This type of scheme is unlike the typical mail fraud scheme wherein the mails are used to initiate or execute the fraud itself. In this case, the fraud is executed without the use of the mails. The mailing of the County Warrants or Invoices had no real affect on this scheme for the reason that the scheme could have just as easily taken place if the warrants and invoices had been picked up by the supplier as they were in many instances.

In conclusion, the Appellant contends this Court has broadened the mail fraud statute beyond the scope intended by Congress. It has turned what is essentially a State or Local offense into a Federal crime. The Supreme Court has addressed a case similar to the one at bar and has held that the mailings in questions were not sufficient to invoke the mail fraud statute.

Appellant respectfully requests this Court to reconsider its holding in this case and reverse the mail fraud convictions.

Appellant finally contends that the Court erred in upholding the conviction on the Hobbs Act counts. The Appellant contends that not even a de minimis effect on Interstate Commerce was shown and consequently Federal jurisdiction was not properly invoked on those counts. Appellant contends that before a conviction can be upheld on the theory of depletion of assets, that it must be shown that the victim customarily or regularly obtained goods through Interstate Commerce. This was not done in the instant case. The evidence concerning dealings in Interstate

Commerce is virtually nonexistent. Some vendors testified they purchased some goods from out of State. However, this is not the type of substantial evidence which is required to sustain a finding that there was even a deminimis effect on Interstate Commerce. The Court seems to place the burden on the Appellant to show that the vendors and the County were not regularly or customarily engaged in purchasing items in Interstate Commerce. Appellant contends that it is the burden of the Government to show that either the County or the vendors were involved in the purchase of goods in Interstate Commerce on a regular basis. Since the evidence in this case did not support such a finding, Appellant contends that the convictions on the Hobbs Act must be reversed.

WHEREFORE, the Appellant respectfully requests this Court to grant his Petition for Rehearing and to hold further argument in this case or in the alternative to reverse the convictions on all counts for the above cited reasons and if necessary, to remand this case to the District Court for further proceedings.

Respectfully submitted,

WILLIAM T. BOSTON
Defendant-Appellant.

STIPE, GOSSETT, STIPE, HARPER, ESTES, McCUNE AND PARKS

(s) *Anthony M. Laizure*
GENE STIPE and ANTHONY M. LAIZURE

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APPENDIX C

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JANUARY TERM—February 17, 1984

Before Honorable Wlliiam J. Holloway, Jr., Honorable Robert H. McWilliams and Honorable Stephanie K. Seymour, Circuit Judges.

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	
vs.	)	No. 82-1323
WILLIAM T. BOSTON, Defendant-Appellant.	)	

This matter comes on for consideration of appellant's petition for rehearing filed in the captioned cause.

Upon consideration whereof, appellant's petition for rehearing is denied.

HOWARD K. PHILLIPS, Clerk

By (s) *Robert L. Hoecker*
Chief Deputy Clerk

APPENDIX D

PUBLISH

[Filed Sept. 30, 1983]

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	
v.	)	No. 82-2213
JAMES LOUIS WHITT, aka JIM WHITT, Defendant-Appellant.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF OKLAHOMA
(D.C. No. 82-41-CR)

Gene Stipe, Stipe, Gossett, Stipe, Harper, Estes, McCune & Parks, McAlester, Oklahoma (Anthony M. Laizure was also on the brief) for Defendant-Appellant

Gary L. Richardson, United States Attorney, Muskogee, Oklahoma (Scott Landon, Assistant United States Attorney, Muskogee, Oklahoma, was also on the brief) for Plaintiff-Appellee

Before HOLLOWAY, McWILLIAMS and SEYMOUR, Circuit Judges

HOLLOWAY, Circuit Judge

Defendant-appellant James Whitt brings this timely appeal from his conviction on thirty counts of mail fraud and three counts of extortion, 18 U.S.C. §§1341 and 1951

respectively. This prosecution was one of many that resulted from an extensive investigation by the F.B.I., the I.R.S., and the United States Attorneys for Oklahoma. The focus of the investigation was the payment to some county commissioners of kickbacks, *i.e.*, bribes, by vendors of equipment and supplies purchased by the counties for road construction, bridge repair, etc.

Defendant Whitt was a county commissioner in Seminole County, Oklahoma. He was charged under the mail fraud statute, 18 U.S.C. §1341 (and 18 U.S.C. §2, punishing, as principals, aidors and abettors and those causing an offense to be committed by another person), with defrauding the citizens of Seminole County of their right to have county government conducted honestly and impartially, and with using the mails in furtherance of the kickback scheme. *See, e.g., United States* v. *Mandel*, 591 F.2d 1347, 1362 (4th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980). Additionally defendant Whitt was charged with extortion in violation of the Hobbs Act, 18 U.S.C. §1951, based on his obtaining the kickbacks "under color of official right," allegedly obstructing or affecting interstate commerce. *See, e.g., United States* v. *Hall*, 536 F.2d 313, 320 (10th Cir. 1976), *cert. denied*, 429 U.S. 919 (1976).

The government's witnesses at trial included several vendors who said they had made illegal payments to Whitt. Each of these witnesses had made an agreement with the United States Attorney to testify in exchange for being allowed to plead guilty to one count of conspiracy to commit mail fraud and to evade taxes, which count was to include all transactions for which the individual could have been charged.[1]

In his defense, Whitt called several witnesses who testified to his good reputation in the community. Several vendors who had dealt with Whitt testified that they had never

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1 One witness was required to plead to two counts.

made payments to Whitt and that he had never requested any kickbacks. A former I.R.S. agent testified that he had studied Whitt's tax returns for the years in question, along with other financial records provided by Whitt, and had found no evidence of unreported income. Finally, Whitt testified in his own defense, denying that he had ever solicited or accepted kickbacks.

On appeal, Whitt claims there was reversible error in that (1) the *voir dire* examination of prospective jurors by the trial court was not adequate to assess the jurors' impartiality in view of the voluminous publicity generated by the county commissioner scandal, and the trial judge failed to question the jurors individually, outside the presence of the other jurors; (2) the routine mailings of county warrants were not made in execution of the alleged scheme to defraud so as to establish a mail fraud case; (3) the evidence on the extortion counts was not sufficient to establish the connection with interstate commerce required by the Hobbs Act; and (4) the trial court erred in instructing the jury on the depletion of assets theory which was not alleged in the indictment. We now consider Whitt's arguments for reversal.

I
The voir dire

Defendant-appellant Whitt asserts that there was reversible error in connection with the *voir dire*. He contends that the extent of the court's *voir dire* of the prospective jurors was inadequate to test the jurors for impartiality in light of the extensive pretrial publicity concerning the county commissioners in the State of Oklahoma.

Whitt notes that all but one juror had read or heard something about the ongoing county commissioner investigations and claims that the trial court had a duty to inquire into "the sources, nature and extent of the information each juror had been exposed to" in order to ascertain the impact of the publicity. (Brief of Appellant at 17). Whitt

says that the *voir dire* was so limited that the trial court could not objectively assess the impact of the pretrial publicity on the jurors and thus could not determine whether or not it affected their partiality. Whitt relies heavily on *Silverthorne* v. *United States*, 400 F.2d 627 (9th Cir. 1968), *cert. denied*, 400 U.S. 1022, where the court stated "that in the absence of an examination designed to elicit answers which provide an objective basis for the court's evaluation, 'merely going through the form of obtaining jurors' assurances of impartiality is insufficient [to test that impartiality].'" *Id.* at 638 (quoting *United States* v. *Denno*, 313 F.2d 364, 379 (2d. Cir. 1963), *cert. denied*, 372 U.S. 978).

Although Whitt lodged a timely request that defense and government counsel be permitted to conduct the *voir dire* of the jury (I R. 19), the trial court conducted the *voir dire* itself as authorized by Rule 24(a) F.R.Crim.P.[2] And it has generally been the practice in this circuit for the court to ask the questions. *United States* v. *Grismore*, 546 F.2d 844, 848 (10th Cir. 1976); *United States* v. *Hall*, 536 F.2d 313, 324 (10th Cir. 1976), *cert. denied*, 429 U.S. 919. The purpose of the *voir dire* procedure is to enable the parties to obtain an impartial jury, *Brown* v. *New Jersey*, 175 U.S. 172, 175 (1899); *United States* v. *Crawford*, 444 F.2d 1404, 1405 (10th Cir. 1971), and it achieves that purpose by laying "the predicate for both the judge's and counsel's judgment about the qualifications and impartiality of potential jurors. Without an adequate foundation, counsel cannot exercise sensitive and intelligent peremptory

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[2] Rule 24(a) F.R.Crim.P. provides:

> Examination. The court may permit the defendant or his attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the defendant or his attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.

challenges, that suitable and necessary means of ensuring that juries be in fact and in the opinion of the parties fair and impartial." *United States* v. *Baker*, 638 F.2d 198, 200 (10th Cir. 1980).

Where there is the possibility or likelihood that potential jurors have been exposed to prejudicial publicity, they must be questioned with special care so as to insure that such publicity did not result in bias.[3] *United States* v. *Hall*, *supra*, 536 F.2d at 324; *Silverthorne* v. *United States*, 400 F.2d 627, 637-38 (9th Cir. 1968), *cert. denied*, 400 U.S. 1022; 8A Moore's Federal Practice, ¶24.03 (1982). Our canvas of the record in this regard is limited by the principle that *voir dire* is within the sound discretion of the trial court, *Ristaino* v. *Ross*, 424 U.S. 589, 594-95 (1976), and the court's exercise of that discretion will not be disturbed, absent a clear showing of abuse. *United States* v. *Polk*, 550 F.2d 1265, 1267 (10th Cir. 1977), *cert. denied*, 434 U.S. 838; *United States* v. *DePugh*, 452 F.2d 915, 921 (10th Cir. 1971), *cert. denied*, 407 U.S. 920.

Here the trial court asked numerous questions of the jury array. Before the panel of twenty-eight prospective jurors was chosen, the court asked the entire venire if any of them had heard or read of this particular case, three prospective jurors indicated that they had, and, after further questioning of those three, the court excused one of them because he had already formed an opinion as to the guilt or innocence of the defendant. (*Voir Dire* R. 7-8). The other two indicated that they had not formed an opinion as a result of hearing or reading about the case. The court also asked if anyone had *not* heard of the case, if anyone was personally acquainted with counsel or the defendant,

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[3] There are, of course, numerous instances, other than through pretrial publicity, where the prejudices of prospective jurors may be aroused and the trial court should tend to be especially probing during *voir dire*. *See, e.g., Ham* v. *South Carolina*, 409 U.S. 524, 527 (1973) (racial prejudice); *United States* v. *Baker*, *supra*, 638 F.2d at n.2.

and whether there was any reason why they may not be fair and impartial to both sides in the case. (*Voir Dire* R. 8-13).

A panel of twenty-eight potential jurors was then seated and, at the outset, the court determined that all but two of the twenty-eight had heard or read of the general investigation into county commissioner practices. (*Voir Dire* R. 18-19). The court then asked whether any of the commissioners in the juror's respective counties had been charged in connection with the investigation, seven responded affirmatively, and the court proceeded to press those seven as to whether that might influence them in any way. As a result of this questioning, the trial judge asked one potential juror to step down because she responded indecisively to his questions, the judge concluding that she "may have trouble putting out the decision in another case from [her] mind." (*Voir Dire* R. 20).[4]

The court also asked the panel general questions propounded in most cases. The potential jurors were asked if they, or members of their immediate families, were ever county employees or involved in law enforcement and numerous individuals were questioned about their professions. Those working in sales or as purchasing agents were sought out and questioned as to whether or not they had ever been involved in the type of business transaction alleged in the instant case and the witness lists of the prosecution and defense were read aloud to determine if anyone on the panel was acquainted with any of the witnesses. The court also asked, at the lawyers' request, whether any of the panel served as jurors in another county commissioner pro-

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[4] Only six of the original twenty-eight panel members indicated that their county commissioner was charged in connection with the investigation. However, a county commissioner of the replacement for the woman excused by the court was also involved in the investigation, thus accounting for the seventh panel member questioned in this regard. (*Voir Dire* R. 21-22).

secution and those who had were further questioned as to whether the prior case had made an influence on them. (*Voir Dire* R. 39-41). Finally, before asking counsel if they had supplemental questions, the court asked the panel the following (*id.* at 43):

> Now, I have asked many questions, Ladies and Gentlemen, and maybe there are some that I should have asked that I haven't but I'm going to ask now for the bottom line question, and then I'm going to call the lawyers up here. *Do any of you, any one of the twenty-eight of you, know of any reason at all that's known to you and unknown to me and unknown to the lawyers and litigants why you could not be a fair and impartial juror in this case?*

(Emphasis added). None of the panel responded.

Counsel were then asked to approach the bench to inform the court if they had further questions they wished the court to ask of the jury. As a result, the court asked two additional general questions.[5] We note that, judging from the substance of the last supplemental question, it seems that it was suggested by defense counsel, yet it did not touch on pretrial publicity in any way.[6]

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[5] The questions were (*Voir Dire* R. 44):

> Do any of you have any such close personal friendship with your own county commissioner or any other county commissioner in this state that may bias you in favor of county commissioners as a whole? None of you do. Thank you.
>
> • • •
>
> Do any of you feel that your own county commissioner has not done a good job; that they don't come out and grade the roads and keep them in proper order so you can get to your farm or your home or whatever? Just done a bum job generally, and you think they're all bad. Any of you fall into that category? None of you do.

[6] All challenges were exercised off of the record. (*Voir Dire* R. 47).

[APPENDIX]

Though the trial court's *voir dire* questions were not as probing or as detailed as Whitt desired, we find no abuse of discretion or prejudicial error. In *Irvin* v. *Dowd*, 366 U.S. 717 (1961), a case of extreme prejudicial pretrial publicity about a defendant charged in six murders, the Court said (*id.* at 722-23):

> It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. (Citations omitted).

We do not feel that the tenor of the pretrial publicity shown by the record in this case was such that the care demonstrated by the trial court was inadequate. "[S]imply because a prospective juror admits having read newspaper accounts relative to a criminal charge is not in itself sufficient grounds for excusing a juror." *United States v. Lamb*, 575 F.2d 1310, 1315 (10th Cir. 1978), *cert. denied*, 439 U.S. 854. We have reviewed the numerous newspaper exhibits relied on by Whitt from a companion case, *United States* v. *Boston*, No. 82-1323, ___ F.2d ___ (10th Cir. 1983), decided today. We note that none of the articles explicitly deals with Whitt. Indeed, several of them indicate that many county commissioners were *not* involved in the kickback scandal.

Thus we feel there is a distinction between the instant case and *Silverthorne* v. *United States*, 400 F.2d 627 (9th Cir. 1968), *cert. denied*, 400 U.S. 1022, on which Whitt relies, where the defendant alone was subject to massive and often virulent publicity prior to trial.[7] Here, the news reporting was not specifically focused on Whitt, nor malicious. *See United States* v. *DePugh*, 452 F.2d 915, 921 (10th Cir. 1971), *cert. denied*, 407 U.S. 920. All of the jurors that remained on the panel responded that, although they may have read or heard of the county commissioner probe or this case, they did not have an opinion either way—and those with pre-formed opinions were excused by the court. *See United States* v. *Hall*, *supra*, 536 F.2d at 325 & n.9. We conclude that the *voir dire* conducted by the court to test the jurors' impartiality was not an abuse of discretion and that the nature of the publicity here did not mandate greater care than was taken so as to insure impartiality.

Whitt further objects to the *voir dire* because the trial court refused to individually question prospective jurors outside the presence of other jurors. The court denied Whitt's request for individual *voir dire*, citing the time and effort such a procedure would entail. As noted, the trial court is granted broad discretion in the conduct of *voir dire* and its exercise of that discretion will not be reversed, absent a clear showing of abuse. In view of our conclusions as to the nature of the pretrial publicity here we find no abuse of discretion in the trial court's denial of Whitt's request that *voir dire* be conducted in such a manner.

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[7] Silverthorne, the president and principal organizer of the San Francisco National Bank, was charged with misapplication of massive amounts of the Bank's funds (approximately $30,000,000) and false entries in bank records. When the bank was closed because of insolvency, "the San Francisco Bay Area newspapers were saturated with more than 300 articles concerning Silverthorne and the alleged reasons for the closing of the bank. Radio and television coverage was likewise extensive." *Silverthorne*, *supra*, 400 F.2d at 631.

In sum, we are not persuaded that there was error in the conduct of the *voir dire* of the jury.

II

Whitt next contends that the mailings of the warrants were not an integral part of the kickback scheme and, therefore, that the scheme does not fall within the purview of the federal mail fraud statute.

Whitt offers three rationales for his argument. First he says that the use of the mails was not a step toward receipt of the fruits of the scheme. This premise is said to be especially true with respect to those transactions in which the kickback was paid before the vendor received the county's warrant. One vendor, Klutts, testified that he usually paid his kickbacks "up front," when an order was placed, instead of waiting until the warrant was received from the county. Tr. 158-59. In addition, several of the transactions at issue were lease-purchase transactions instead of direct purchases. In a lease-purchase transaction the county would lease equipment from the vendor with an option to purcase the equipment at the end of the lease. The vendor would assign its rights under the lease to a local bank. The vendor would pay the kickback to Whitt and the county would make monthly payments to the bank.

Whitt's second theory to support this proposition is related to the first. He contends that the government's failure to prove the sequence of the other transactions, *i.e.*, the failure to prove that the kickbacks were paid after the warrants were received, results in failure to establish that the mailings were in furtherance of the fraudulent scheme. Third Whitt argues that the mailings were, in effect, compelled by state law and that, in light of *Parr* v. *United States*, 363 U.S. 370 (1960), such mailings cannot be the basis for conviction under § 1341.

We need not discuss these arguments in detail as we have considered and rejected similar contentions in other opinions filed this date. *See United States* v. *Primrose*,

No. 82-1842, ___ F.2d ___ (10th Cir. 1983), and *United States* v. *Gann*, No. 82-1591, ___ F.2d ___ (10th Cir. 1983). In *Primrose* we concluded that the mailings of warrants were integral to the overall scheme, regardless of whether the illegal kickback payment was made before or after the mailing, slip opinion at 10-12, and we distinguished the kickback scheme from the misappropriation of school revenues in *Parr*, slip opinion at 13-15. In *Gann* we held that the lease purchase transactions were properly within the purview of the mail fraud statute. Slip opinion at 5-6. On the reasoning in those opinions we conclude that Whitt's arguments are without merit.

III

As to Whitt's contention that the evidence on the extortion counts failed to establish the effect on commerce required under the Hobbs Act, we again are guided by our opinion of the date in another case arising from the county commissioner investigation, *United States* v. *Boston*, No. 82-1323, ___ F.2d ___ (10th Cir. 1983). In *Boston*, we held that a *de minimis* effect on commerce would sustain federal jurisdiction under § 1951.

The instruction given in the instant case differs somewhat from that given in *Boston*, where the jury was told that one element of a Hobbs Act violation was that the defendant "actually *or potentially* obstructed, delayed or affected commerce." Here the court instructed that the prosecution was required to prove "that the natural consequences of the acts alleged. . . would be to delay, interrupt or adversely affect" commerce. As in *Boston*, the jurors were further told that the government could carry its burden of proof on this element by any of the following three showings: (1) that the vendor was engaged in commerce and that the depletion of the vendor's assets would be the natural consequence of the alleged extortion; (2) that Seminole County was engaged in commerce and that depletion of its assets would be a natural consequence of the

alleged extortion; or (3) that the vendor purchased supplies from outside the State of Oklahoma which were then brought into the State and delivered to Seminole County as a result of the alleged extortion. Based on our holding in *Boston* we find no error in this instruction. We do not agree with Whitt's assertion that the evidence was insufficient.

Whitt argues that the testimony of one vendor, Klutts, gave no indication at all that he was engaged in interstate commerce. Although this observation is correct, it does not support Whitt's position that the conviction on this count should be reversed. Klutts did testify that he charged the county higher prices because of the kickback scheme. Tr. 127, 176-77. Other trial testimony indicated that Seminole County regularly purchased goods that had moved in interstate commerce. Therefore on the second ground outlined above, there was sufficient evidence for the jury to make the required finding to support the conviction on this count.

The vendors who were the victims in the other two extortion counts, Litton and Bucklin, testified that they made purchases from other states. Litton testified that some of the products he sold came from other states. Bucklin testified that machinery his company sold was manufactured outside of Oklahoma. Tr. 184, 280. Whitt says the evidence of an interstate nexus is "almost non-existent." We disagree and find the evidence sufficient to support the convictions.

Whitt relies on two cases from other circuits for the proposition that the evidence must establish that the extortion victim "customarily" obtained goods through interstate commerce. *United States* v. *Elders*, 569 F.2d 1020 (7th Cir. 1978); *United States* v. *Merolla*, 523 F.2d 51 (2d Cir. 1975). We are not pursuaded that the cases call for reversal here.

In *Elders* the evidence conclusively established that the victim had ceased purchasing goods from outside the

State before the extortion and went out of business shortly after the extortion. Even on those facts the reversal of the conviction prompted a vigorous dissent. 569 F.2d at 1026-27 (Bauer, J., dissenting). Here there was no comparable evidence that any extortion victim had ceased to make interstate purchases. *Merolla* is similarly unhelpful to Whitt. There the victim was a construction company that was formed solely to perform the one contract involved in the indictment. These cases are readily distinguishable from the instant case. Here the evidence indicated the victims (whether the victim is seen as the county or the vendor) were engaged in commerce on a continuing basis.

Accordingly we conclude that the evidence was sufficient to support the Hobbs Act convictions.

IV

Whitt argues further that the court erred in instructing the jury on the depletion of assets theory (*see* Part III) as a method of establishing the requisite effect on commerce under the Hobbs Act. He does not contend that the theory is itself spurious. Rather, his claim is that the failure to include the theory in the indictment prejudiced him and that instructing on the theory when it was not charged in the indictment constituted an amendment of the indictment in violation of his Fifth Amendment rights. We considered and rejected this argument in *Boston*. For the reasons stated there, (slip op. at 7), we find that this proposition is without merit.

V

Whitt submitted one final contention which was allowed to be briefed by special order of the court. Whitt claims error in the trial court's refusal to permit him to introduce evidence that a government witness, McKiddy, had failed a polygraph examination. Whitt does not seek to overturn the general rule that polygraph examination results are inadmissible. Instead, he argues that special

circumstances present here required the admission of the proof as an exception to that rule.

McKiddy was a vendor who testified that he had paid kickbacks to Whitt. Because none of these transactions were within the statute of limitations, McKiddy's testimony was used to establish a scheme or plan rather than as direct evidence of the kickback and mailings on any particular count. *See United States* v. *Blosser*, 440 F.2d 697, 699 (10th Cir. 1971). McKiddy, like other vendors who testified, had agreed to cooperate with the United States Attorney in the prosecution of county commissioner cases, in exchange for a promise to have only one count against him presented to a grand jury. As part of this agreement each witness had consented to submit to a polygraph examination if requested to do so.

Whitt says that he should have been allowed to cross-examine on the results of that polygraph and to disclose them to the jury because the prosecution opened the door by offering the plea agreement in evidence on direct examination of McKiddy. Whitt contends that the court's refusal to permit this violated his Sixth Amendment right to confront witnesses, which is paramount, citing *Davis* v. *Alaska*, 415 U.S. 308 (1974). He further argues that his due process rights were violated when, after this adverse ruling, the prosecutor was allowed to comment, over objections, in closing argument that the government witnesses were not likely to have been motivated to lie to the investigators because they were subject to polygraph testing. The trial court said that there was a difference in the use made of the point in argument in that the plea agreement "speaks of the obligation of the party to take the polygraph test, though." Tr. 438.

We are not persuaded that reversible error occurred. We do agree that an unfairness resulted when the government referred, during argument, to the provision on polygraphs in the plea agreement, after objecting and preventing reference to the results of their admission in evidence. We

are convinced nevertheless that any error committed by the trial court in connection with these rulings was harmless. McKiddy's testimony was not crucial to proof of the kickbacks in question, being instead evidence of other kickbacks paid to Whitt as proof of the scheme alleged.[8] The polygraph results show that the responses indicative of deception were made to questions that did not involve the defendants' receipt of the kickbacks charged.[9] While the results might have been useful to impeach the witness, the matters involved were not of serious importance in the case. In the circumstances any error was harmless.

VI

In sum, the defendant appellant has not demonstrated any reversible error in the record of his trial. Accordingly the judgment is

AFFIRMED.

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[8] Whitt relies primarily on *United States* v. *Hart*, 344 F.Supp. 522 (E.D.N.Y. 1971), in which polygraph results were held admissible under special circumstances. In *Hart* the prosecution knew that its principal witness had failed a polygraph examination. During cross-examination the witness had blurted out that he had taken the test. The court said the case should be considered primarily in light of *Brady* v. *Maryland*, 373 U.S. 83 (1963); that the defendant was entitled to inquire concerning investigations which might put the government on notice that a government witness was untruthful, citing *Napue* v. *Illinois*, 360 U.S. 264 (1959); and that the test results were admissible on behalf of the defendant because the government initially thought they were reliable enough to assist it in evaluating its witness, although this did not constitute any reason for changing the general rule against admission of such evidence.

However, here the witness McKiddy was not a crucial one and the falsehoods indicated did not concern the defendant's conduct. While the *Hart* case is convincing, we do not feel that it calls for reversal here.

[9] The polygraph results are in the record, having been admitted as *in camera* exhibits, and defense counsel was permitted to examine them during cross-examination of McKiddy.

APPENDIX E

PUBLISH

[Filed Sept. 30, 1983]

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	
v.	)	No. 82-1842
JIMMIE HAROLD PRIMROSE, Defendant-Appellant.	)	

Appeal from the United States District Court
for the Eastern District of Oklahoma
(D. C. No. 82-5-CR)

Gene Stipe (Anthony M. Laizure with him on the brief) of Stipe, Gossett, Stipe, Harper, Estes, McCune & Parks, McAlester, Oklahoma, for Defendant-Appellant.

Gary L. Richardson, United States Attorney (Edward M. Kimmel, Assistant United States Attorney, with him on the brief), Muskogee, Oklahoma; for Plaintiff-Appellee.

Before HOLLOWAY, McWILLIAMS, and SEYMOUR, Circuit Judges.

SEYMOUR, Circuit Judge.

Jimmie Harold Primrose was indicted on thirty-eight counts of mail fraud, 18 U.S.C. §§ 2, 1341 (1976), and three counts of extortion, 18 U.S.C. § 1951 (1976), in connection

with an alleged scheme to defraud the citizens of Murray County, Oklahoma. A jury convicted him of thirteen counts of mail fraud. On appeal, he asserts that: (1) the trial court erred in not dismissing the indictment for unnecessary delay in bringing him to trial; (2) the voir dire of jurors was inadequate; (3) the Government failed to prove a use of the mails for the purpose of executing a scheme to defraud; (4) the trial court abused its discretion by admitting evidence of crimes not charged in the indictment; (5) the prosecutor's references to other county commissioners were improper and prejudicial; (6) the prosecutor improperly cross-examined defense witnesses; and (7) certain remarks the prosecutor made during closing argument constituted improper vouching for witnesses. For the reasons set out below, we affirm.

I.
BACKGROUND

In setting forth the circumstances giving rise to this appeal, we view the evidence in the light most favorable to the jury's verdict. *United States v. Petersen*, 611 F.2d 1313, 1317 (10th Cir. 1979), *cert. denied*, 447 U.S. 905 (1980). Primrose was elected county commissioner for district 3 of Murray County in 1969, and was re-elected for successive terms. In Oklahoma, counties are divided into three districts, and each district is represented by an elected commissioner. One witness described county commissioners as the "managers" and "operators" of the county. Rec., supp. vol. I, at 155. Among other things, they are responsible for maintaining county roads and bridges, a duty that includes authority to make purchases of supplies and equipment.

Primrose was charged with defrauding the citizens of Murray County by purchasing various materials and supplies for the county in exchange for kickbacks from the vendors, and by placing orders for materials and supplies

that were not to be delivered and splitting with the vendors the amount paid by the county for the undelivered goods.[1] The Government's four chief witnesses were vendors who testified about the alleged kickbacks and "split deals" or "50-50 splits."

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[1] More specifically the indictment charged:

"COUNT 1

"(18 U.S.C. 1341 and 2)

"1. During the period commencing on or about October 9, 1971, and continuing thereafter to on or about, May 14, 1980,

JIMMIE HAROLD PRIMROSE

the defendant herein, while serving as County Commissioner of Murray County, Oklahoma, devised and intended to devise a scheme to defraud the citizens of Murray County by depriving the citizens of that County of their right to have Murray County's business conducted openly, honestly, and impartially, free from corruption and undue influence.

"The scheme to defraud the citizens of Murray County was in substance as follows:

"2. As part of the scheme to defraud, Jimmie Harold Primrose, in his official capacity as County Commissioner of Murray County, did place orders and purchase road and bridge building and maintenance materials and supplies for Murray County from various vendors, and in particular, Ernest Leslie Irwin, d/b/a either Independent Industries, Inc., or Machinery Parts and Service Co.; Tommy L. Craft, d/b/a T. L. Craft Road and Bridge Materials; Billy J. Klutts, d/b/a Okie Equipment Co.; and Edward B. Wilson, d/b/a Wilson Materials Co., in exchange for which the defendant did receive from these sellers of road and bridge building and maintenance supplies, cash kickbacks.

"3. It was a further part of the scheme to defraud that the defendant, Jimmie Harold Primrose, in his official capacity as County Commissioner of Murray County, knowingly did place orders with various vendors, and, in particular, Ernest Leslie Irwin, d/b/a Independent Industries and Billy J. Klutts, d/b/a Okie Equipment Company for road and bridge building and maintenance materials and

[APPENDIX]

The first witness, Edward Wilson, had been a salesman for Long Brothers Materials Co. from 1973 to 1974, then

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[1] (Continued)

supplies which were not actually to be delivered to the County in exchange for which Ernest Leslie Irwin and Billy J. Klutts did pay to the defendant, Jimmie Harold Primrose, in cash, a sum of money representing approximately 50% of the billed value of the fictitious and nonexistent goods which were represented to have been sold to the County.

"4. That on or about May 24, 1977, in the Eastern Judicial District of Oklahoma, Jimmie Harold Primrose, the defendant herein, for the purpose of executing the aforesaid scheme to defraud, and attempting to do so, did cause to be placed in an authorized mail depository, to be sent and delivered by the U.S. Postal Service, from Murray County, Oklahoma, located in the Eastern Judicial District of Oklahoma to Okie Equipment Company, Meeker, Oklahoma, an envelope containing County Warrant Number 646, in the amount of $714.00, all in violation of Title 18 United States Code, Sections 1341 and 2.

Rec., vol. I, at 1-2. Counts 2-7 incorporated the allegations contained in Count 1 except for the date, warrant number, and amount described in paragraph 4, listing instead six other warrants addressed to Okie Equipment Co. Counts 8-34 incorporated allegations contained in the first three paragraphs of Count 1, then charged that Primrose on or about specified dates, "for the purpose of executing the aforesaid scheme to defraud, and attempting to do so, did cause" Independent Industries, Inc. (Counts 8-23), Machinery Parts and Service Co. (Counts 24-27), and T. L. Craft Road & Bridge Material (Counts 28-34) "to place in an authorized mail depository to be sent and delivered by the U.S. Postal Service to Murray County" envelopes containing specified invoices for specified amounts "which caused the issuance" of specified county warrants, all in violation of 18 U.S.C. §§ 2, 1341 (1976). Rec., vol. I, at 3-4. Counts 35-38 alleged that Primrose entered into lease-purchase agreements with E. L. Irwin for which he received kickbacks. Counts 39-41 charged Primrose with violations of the Hobbs Act, 18 U.S.C. § 1951 (1976).

The jury found Primrose not guilty of Counts 8-27, 31, and 35-41, and guilty of Counts 1-7, 28-30, and 32-34. Our review is of couse limited to the 13 counts of which he was found guilty.

had his own firm, Wilson Material Co., from 1974 to 1979.[2] Wilson testified that he had paid Primrose ten percent cash kickbacks when Primrose placed orders with him. He also testified about several "split deals" he had made with Primrose:

> "Well, we would just meet and visit and discuss what we was going to do. And he would say, or I would say let's make a deal for, you know, a couple of hundred, or 150, and then I would just double it. And then I would go to my books and he would say put it on a tin horn or put it on lumber. And I would just figure out the amount it would take to come up to that total."

Rec., supp. vol. I, at 253. Wilson would pay Primrose half the total, bill the county for the goods that he never delivered, and receive his warrant (the county's "check") in the mail.

The three other vendors gave similar testimony. Bill Klutts, a co-owner of Okie Equipment Co., sold supplies and equipment to counties from 1977 to 1979. He testified that "[i]n most all cases there was a ten percent kickback built right into your price of supplies, tin horns, and lumber, grader blades." *Id.* at 308. He identified purchase orders, invoices, and warrants relating to seven transactions he had had with Primrose. These transactions constituted Counts 1-7 of the indictment. He testified that he had paid Primrose at least a ten percent kickback on each transaction and that the transaction described in Count 2 "was probably a split order." *Id.* at 318-19. He said that his in-

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[2] Because he had not done business with Primrose after 1976, Wilson's testimony only concerned offenses which could not be prosecuted because of the five-year statute of limitations. *See* 18 U.S.C. § 3282 (1976). The trial judge admitted the testimony with a cautionary instruction that it was only to be considered to show the existence of a plan or scheme. *See* Fed. R. Evid. 404(b).

voices had been mailed to Murray County and that Murray County had mailed him warrants in payment.

T. L. ("Tommy") Craft, the owner of T. L. Craft Materials, Inc., sold bridge lumber and grader blades to Primrose's district. He testified to seven transactions, corresponding to Counts 28-34, on which he had paid Primrose ten percent kickbacks.[3] He also testified that he had paid Primrose kickbacks on twelve other transactions that were not listed in the indictment[4] and "[m]ight have split one or two with him back there." *Id.* at 378. Craft stated that his company's invoices had been mailed to the county and the county had mailed its warrants to him.

E. L. ("Cotton") Irwin, who represented Independent Industries, Inc., and Machinery Parts & Service Co., also related his dealings with Primrose. He said that he usually had paid Primrose a ten percent kickback, although he had paid a smaller kickback on machinery and also had made a few "splits" with him.[5] Irwin stated that his companies had mailed invoices to the county and had received the county's warrants in the mail.

State law requires a notarized statement of noncollusion on every invoice submitted to a county for payment of $1,000 or more. Each supplier must state "that (s)he

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[3] The jury acquitted Primrose of Count 31, although it found him guilty of Counts 28-30 and 32-34.

[4] The judge admitted this testimony only "for the limited purpose of establishing a plan or scheme," rec., supp. vol. I, at 374, and gave a cautionary instruction to that effect.

[5] The jury acquitted Primrose on Counts 8-27 and 35-38, which were the mail fraud counts relating to Irwin.

Much of Irwin's testimony related to abount twenty transactions that were not listed in the indictment. The judge repeatedly cautioned the jury to consider this testimony and corresponding exhibits "for the limited purpose of establishing a common plan or scheme." Rec., supp. vol. I, at 442; *see id.* at 457, 461.

has made no payment directly or indirectly to any elected official, officer or employee of . . . any county . . . of money or any other thing of value to obtain payment." Okla. Stat. tit. 74, § 3109 (1981). Each of the four vendors testified that he was required to submit such affidavits with his purchase orders and invoices in order to get paid.

The defense presented nineteen witnesses who all said they never knew Primrose to take kickbacks. Three women who had done office work for the three Murray County commissioners testified that Irwin, Klutts, and Craft periodically had come into the county courthouse, sometimes to deliver invoices, sometimes to pick up warrants, and sometimes to call on the commissioners. The women had never witnessed kickbacks. One man said he had worked for Irwin for several years and had never heard anything about kickbacks. Ten vendors testified that they had done business with Primrose and had never paid kickbacks nor had they been asked to do so. Two mechanics for Primrose's district testified that certain equipment that Irwin testified had not been delivered in fact had been installed on a county bulldozer. Three witnesses said Primrose had a good reputation for honesty. Finally, Primrose himself testified that he had never taken kickbacks and, on the contrary, had stopped doing business with Klutts when offered a kickback.

II.
PRE-TRIAL DELAY

Primrose was indicted November 19, 1981, on thirty counts of mail fraud and one count of extortion. On December 31 the Government gave Notice of Dismissal of the indictment. The trial court granted the Government leave to dismiss on January 4, 1982, the date the case was originally scheduled to go to trial. *See* Fed. R. Crim. P. 48(a). Three days later a second indictment was returned against Primrose, charging him with thirty-eight counts of mail fraud and three counts of extortion. Primrose was ar-

rainged and trial was set for March 1. Primrose moved to dismiss the second indictment under Federal Rule of Criminal Procedure 48(b) on the ground of unnecessary delay. Primrose appeals the district court's denial of this motion. He does not, however, allege any violation of the Speedy Trial Act, 18 U.S.C. §§ 3161-3174 (1976), of the speedy trial clause of the Sixth Amendment, or of the due process clause of the Fifth Amendment.

Rule 48(b) provides:

> "If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint."

The rule is applicable only to post-arrest situations. *United States* v. *Lovasco*, 431 U.S. 783, 789 n.8 (1977); *United States* v. *Marion*, 404 U.S. 307, 319 (1971); *United States* v. *McManaman*, 606 F.2d 919, 922 n.5 (10th Cir. 1979). Because Primrose was not arrested prior to indictment, Rule 48(b) is inapplicable.

III.
VOIR DIRE OF JURORS

Primrose asserts that voir dire in this case was inadequate because all the jurors had read or heard about the ongoing county commissioner investigation. He contends that the voir dire was not sufficiently broad to permit the trial court to assess the effect of this publicity on the jurors' ability to be impartial. He also argues that each juror should have been questioned individually out of the presence of other jurors.

We have considered virtually identical arguments in *United States* v. *Whitt*, ___ F.2d ___, No. 82-2213 (10th Cir. 1983), filed this date. In *Whitt*, as in this case, the trial judge asked general questions regarding the potential

jurors' exposure to publicity, and then questioned individual jurors about their ability to be fair and impartial despite what they had heard or read. Based on the authorities and the analysis set forth in *Whitt*, we conclude that the voir dire here was adequate and did not constitute reversible error.

IV
MAIL FRAUD

The mail fraud statute provides:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

18 U.S.C. § 1341 (1976) (emphasis added). Primrose argues that, even assuming the Government showed mailings and the existence of a scheme to defraud, the mailings alleged were insufficiently related to the purported scheme to sustain his convictions. The question before us, then, is whether the county's mailings of warrants to Klutts, and Craft's mailings of invoices to the county, were for the purpose of executing a scheme to defraud.[6]

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[6] Primrose was convicted on Counts 1-7, which were based on the warrants mailed to Klutts, and Counts 28, 29, 30, 32, 33, and 34, which were based on invoices mailed by Craft. *See* note 1 *supra*. The mailings in the Wilson and Irwin transactions did not result in convictions, and are therefore not before us on appeal.

"The federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud." *Kann* v. *United States*, 323 U.S. 88, 95 (1944). However, "[i]t is not necessary that the scheme contemplate the use of the mails as an essential element." *Pereira* v. *United States*, 347 U.S. 1, 8 (1954).

Primrose argues that because the mailings alleged in the indictment occurred after the kickbacks were paid, they could not be for the purpose of executing the scheme inasmuch as the scheme would have already reached fruition. Primrose's view of the scheme is too narrow. His argument rests on limiting the scheme to his receipt of kickbacks. In fact, however, the scheme to defraud the citizens of Murray County necessarily included the vendors' receipt of payment from the County: the scheme could not reach fruition before that occurred.

United States v. *Bottom*, 638 F.2d 781 (5th Cir. 1981), involved a scheme strikingly similar to that in the instant case. The defendant commissioners raised the same argument Primrose does here, but the court rejected it:

> "Concerning the next issue as to the sufficiency of the evidence to prove mail fraud, the defendants argue that the scheme was complete once they received their money from Baldwin, which occurred up-front before Baldwin submitted his invoices to the county, before the county submitted checks to Baldwin, and before the commissioners initialed copies of the checks; and that if the scheme was complete, then the mailings were not sufficient to bring the transactions within the scope of the mail fraud statute. The defendants rely on *United States* v. *Maze*, 414 U.S. 395, 94 S.Ct. 645, 38 L.Ed. 603 (1974).
>
> ". . . .
>
> "The fraudulent scheme in the instant case employed mailings which were integral to the execution

of the fraudulent plans and which were not made after the fruition of the fraud but were necessary to complete the scheme. The scheme was not complete when Baldwin paid the defendants 'up-front' the bogus or padded amounts in the invoices because Baldwin still needed the assistance of the defendants, who were the only ones who knew about the fraud and who had control of all the paperwork in their districts, to initial copies of the checks which reflected payment of the phony invoice attached to it. Furthermore, the county was not defrauded and the scheme complete until the checks were approved by the commissioners, the money released and the checks mailed to Baldwin. From the beginning of the scheme the defendant commissioners, who knew that the invoices were bogus or padded, were also aware that Baldwin would be paid by a check mailed to him by the county. Therefore, in this case, the mailing of the checks was an essential step integral to the completion or fruition of the scheme."

Id. at 785-86.

In *United States* v. *Boyd*, 606 F.2d 792 (8th Cir. 1979), the defendant, a director of two projects receiving federal grants, demanded that a consultant kick back a portion of his consulting fees. The mailings involved were grant requests sent by Boyd and by a state agency on behalf of his organizations. The court stated:

"One element of the continuing kickback scheme was the repeated financing of the various projects Boyd controlled. Continued receipt of grant monies which Boyd could pay out to [the consultant] as consulting fees was necessary to perpetuate and carry out this continuous scheme. Conduct is within the mail fraud statute when, as in this case, the use of the mails for the purpose of executing the flow of payoff funds is a reasonably foreseeable possibility in furthering the transaction, especially when the scheme continues and repeats over an extended period of time."

Id. at 794. Here, the mailings of invoices and warrants ensured that the vendors got paid, which was an essential part of the scheme. *See also United States* v. *Grande*, 620 F.2d 1026, 1029-30 (4th Cir.) (mailings of notice to proceed, payment, and bill relating to fraudulently obtained demolition contract), *cert. denied*, 449 U.S. 830, 919 (1980); *United States* v. *Diggs*, 613 F.2d 988, 998-99 (D.C. Cir. 1979) (mailing of congressional employees' paychecks, out of which defendant was paid kickbacks), *cert. denied*, 446 U.S. 982 (1980). We conclude that the mailings at issue here are sufficient to bring the scheme within the mail fraud statute.

In this case, some invoices submitted by Craft included an affidavit of noncollusion, which is required by state law to be attached to all invoices in excess of $1,000. These mailings served the further purpose of preventing discovery of the scheme. In *United States* v. *Sampson*, 371 U.S. 75 (1962), the indictment alleged a scheme in which the defendants "purported to be able to help businessmen obtain loans or sell out their businesses." 371 U.S. at 77. After the victims submitted their applications accompanied by application fees, the defendants allegedly mailed them "the accepted application together with a form letter . . . 'for the purpose of lulling said victims by representing that their applications had been accepted and that the defendants would therefore perform for said victims the valuable services which the defendants had falsely and fraudulently represented that they would perform.'" *Id.* at 78 (quoting indictment). The district court dismissed the indictment, reasoning, on the authority of *Kann*, 323 U.S. 88, and *Parr* v. *United States*, 363 U.S. 370 (1960), that no offense was charged because the mailings were after the defendants received their money and hence could not have been for th purpose of executing the scheme. The Supreme Court reversed, holding that the subsequent mailings for the purpose of convincing the victims of the scheme that they had not been defrauded are " 'for the purpose of executing' a scheme within the meaning of the mail fraud statute."

Id. at 81. *See also U.S.* v. *Curry*, 681 F.2d 406 (5th Cir. 1982); *Sparrow* v. *United States*, 402 F.2d 826, 829 (10th Cir. 1968) ("lulling" letter). The vendors' false affidavits in this case helped to conceal Primrose's kickback scheme.

Primrose cites *United States* v. *Maze*, 414 U.S. 395 (1974), *Kann*, 323 U.S. 88, and *United States* v. *Wolf*, 561 F.2d 1376 (10th Cir. 1977), in support of his argument that mailings after a defendant receives the fruits of a fraud are not for the purpose of executing the fraud. "*Kann* and *Maze* hold merely that under the facts of those cases the fraudulent schemes had ended before the mailings occurred. If the scheme continues, mailings made after receipt of the money can clearly support conviction." *U.S.* v. *Knight*, 607 F.2d 1172, 1175 (5th Cir. 1979). *Wolf* is similarly distinguishable.

Finally, Primrose analogizes the mailings of invoices and warrants in this case to the mailings involved in *Parr* v. *United States*, 363 U.S. 370 (1960). *Parr* concerned the misappropriation of a school district's funds by members of the school board, its secretary, its attorney, and certain bank officers. The mailings related to the assessment and collection of taxes, duties assigned to the school board by the state constitution and statutes. In the absence of any showing "that the taxes assessed and collected were excessive, 'padded' or in any way illegal," *id.* at 387, the Court concluded:

> "[I]t cannot be said that mailings made or caused to be made under the imperative command of duty imposed by state law are criminal under the federal mail fraud statute, even though some of those who are so required to do the mailing for the District plan to steal, when or after received, some indefinite part of its moneys."

Id. at 391. Primrose likens his situation to that in *Parr:*

> "Primrose was compelled by state law to purchase materials, supplies and equipment for his district. The

> Board of County Commissioners was compelled by state law to issue the warrants for payment of goods purchased for a county purpose. The warrants introduced at trial were not shown to have been padded or unlawful in any way, nor did the indictment so allege. No such issue regarding padded invoices was submitted to the jury. Lastly, although the law did not compel the County Clerk to mail the warrants, the law obligated the County to issue warrants in payment of County obligations and in effect, caused the County Clerk to use the mails."

Brief of Appellant at 45.

Primrose's reliance on *Parr* is misplaced because it necessarily rests on his view of the vendors as outsiders rather than as the participants they were. If the scheme is properly viewed as including the vendors' receipt of county business as well as Primrose's receipt of kickbacks, the analogy to *Parr* breaks down. Primrose may have been legally required to purchase supplies, materials, and equipment, but he was not required to purchase them from vendors who paid him kickbacks. In fact he was required *not* to accept kickbacks. *See* Anti-Kickback Act of 1974, Okla. Stat. tit. 74, § 3404 (1981).

In sum, causing the mails to be used so that the county would pay the vendors who had paid kickbacks constitutes a violation of the mail fraud statute. The argument is even stronger in the case of the "50-50 splits" because a county commissioner's duties clearly do not include ordering goods that are not to be delivered. The warrants mailed to Klutts and the invoices mailed by Craft were each in furtherance of the fraud within the meaning of the mail fraud statute.

V.
OTHER ACT EVIDENCE

Primrose contends that the trial court should have excluded evidence of transactions not charged in the indictment because such evidence was "cumulative at best, and prejudicial at worst." Brief of Appellant at 37. He argues that this evidence was unnecessary to prove the existence of a scheme to defraud, which the Government should have been able to show by proving the thirty-eight charged counts. He asserts that evidence of forty-five kickbacks outside the five-year limitations period was highly prejudicial.

A trial court has broad discretion to determine whether the probative value of evidence outweighs the risk of prejudice. *See* Fed. R. Evid. 403;[7] *see also United States* v. *Franklin*, 704 F.2d 1183, 1187 (10th Cir. 1983). Rule 404(b) of the Federal Rules of Evidence provides:

> "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

Under this Rule, the trial court admitted testimony and documentary evidence of Primrose's dealings with Wilson, a salesman and vendor, and some of his dealings with vendors Craft and Irwin.

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[7] Rule 403 provides:

> "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Fed. R. Evid. 403.

In a factually similar case, involving an Arkansas road commissioner taking kickbacks, the Eighth Circuit upheld the admission of such evidence.

> "The fact that a number of the overt acts performed in furtherance of the conspiracy were committed beyond the statute of limitations does not preclude the admission in evidence of such acts to show the nature of the scheme and [the commissioner's] intent when the later use of the mails occurred."

United States v. *Scott*, 668 F.2d 384, 387 (8th Cir. 1981); *see also United States* v. *Adcock*, 558 F.2d 397 (8th Cir.), *cert. denied*, 434 U.S. 921 (1977).

We find these cases persuasive. The indictment here alleged the existence of a scheme for a period before the overt acts charged. The trial court did not abuse its discretion in admitting evidence of Primrose's other dealings. *See United State* v. *Lea*, 618 F.2d 426, 431-32 (7th Cir.) (testimony that defendant solicited kickbacks from broker not in indictment), *cert. denied*, 449 U.S. 823 (1980); *United States* v. *Reece*, 614 F.2d 1259, 1262 (10th Cir. 1980) (evidence of defendants' kickback scheme with meat broker admissible in mail fraud trial for two similar schemes); *United States* v. *Walton*, 552 F.2d 1354, 1365 (10th Cir.) (evidence of sixth check in prosecution for interstate transportation of five stolen checks), *cert. denied*, 431 U.S. 959 (1977); *but see United States* v. *O'Connor*, 580 F.2d 38, 42 (2d Cir. 1978) (error to admit evidence that defendant meat inspector took bribes at three plants not charged in indictment).

The court instructed the jury to consider evidence concerning offenses and conduct not charged in the indictment "for the limited purpose or purposes of establishing intent, motive, knowledge, plan, [or] absence of mistake or accident . . . ." Rec., supp. vol. II, at 843. The court also gave a cautionary instruction each time such evidence was admitted. We find no abuse of discretion.

VI.

PROSECUTORIAL MISCONDUCT

A. *Reference to Other County Commissioners*

The prosecutor briefly questioned four witnesses about Jimmy Frazier and Bird Lance, Jr,. the two other commissioners for Murray County. Frazier had pled guilty and Lance had been found guilty of charges similar to Primrose's. Primrose asserts that these references were improper and prejudicial and denied him his right to a fair trial.

The first such references came during the redirect examination of Klutts. During cross-examination, Primrose's counsel had asked Klutts whether he "did business with other county commissioners in Murray County after January of '78" (when he last did business with Primrose). *Id.*, supp. vol. I, at 348. The prosecutor then asked Klutts the names of these county commissioners and elicited testimony that he had paid kickbacks to Frazier and Lance. The trial court found that this was proper redirect because defense counsel had opened the door on cross. We find no abuse of discretion.

The three other references occurred during the prosecutor's cross-examination of defense witnesses. Clarence Knight, who had testified to Primrose's good reputation in the community for being an honest, law-abiding citizen, was asked about Frazier's and Lance's reputations. The court sustained defense counsel's objections when the prosecutor asked whether their reputations had changed recently. Otis Saunders also testified to Primrose's good reputation. During cross-examination, he said that his company also did business with Lance and Frazier and that they both had good reputations. Finally, Bobby Riddle, who had said that Primrose had a good reputation, was asked if his company did business with the other commissioners and what their reputations were. This time the court sustained defense counsel's objection and that line

of questioning was stopped. From our examination of the record, we are convinced that any error was harmless. *See* Fed. R. Crim. P. 52(a).

B. *Cross-Examination on Primrose's Reputation*

Primrose contends that the prosecutor improperly cross-examined three defense witnesses who had testified on direct examination as to Primrose's good reputation for honesty and integrity in the community.

The prosecutor asked each witness to speculate on what Primrose's community reputation would be if people knew he was guilty of taking kickbacks. In *United States* v. *Polsinelli*, 649 F.2d 793 (10th Cir. 1981), we held it improper for the Government to ask such questions because they are based on the assumption that the defendant is guilty of the very crimes for which he is being tried. *See also U.S.* v. *Candelaria-Gonzales*, 547 F.2d 291 (5th Cir. 1977). In this case, however, no objection was made below to the questioning now raised as error. Accordingly, we may reverse on this ground only if it constitutes plain error affecting substantial rights. Fed. R. Crim. P. 52(b). In making this determination we must assess whether the verdict was substantially swayed by the error. *Kotteakos* v. *United States*, 328 U.S. 750, 765 (1946); *United States* v. *Baez*, 703 F.2d 453, 455-56 (10th Cir. 1983). In view of the abundant evidence of guilt in the record as a whole, we conclude that reversal is not required.

C. *Vouching for Witnesses*

Primrose asserts that the prosecutor vouched for the Government's witnesses in his closing argument. This court has repeatedly condemned personalized vouching for the integrity of government witnesses. *See, e.g., United States* v. *Beckman*, 662 F.2d 661, 662 (10th Cir. 1981); *United States* v. *Carleo*, 576 F.2d 846, 851-52 (10th Cir.), *cert. denied*, 439 U.S. 850 (1978); *United States* v. *Ludwig*, 508 F.2d 140, 143 (10th Cir. 1974); *United States* v. *Martinez*,

487 F.2d 973, 977 (10th Cir. 1973). Attorneys may not express their personal beliefs concerning the evidence or the witnesses. *United States* v. *Grapp*, 653 F.2d 189, 195 (5th Cir. 1981).

It does not appear from our examination of the transcript, however, that the Government did in fact vouch for the integrity of its witnesses. In his closing argument, Primrose's counsel remarked:

> "So, one of these desperate individuals turns your name into the Government and you are prosecuted and you come to hire me. And I say, well, I'll represent you but we've got a difficult time because someone is accusing you and here is what they are saying about you, they are saying just the two of you are alone together, no other evidence is available except the desperate person who accused you, his word against your word. How are we going to defend it? What can we say?"

Rec., supp. vol. II, at 819. It was in response to that argument that the prosecutor made the remarks about which Primrose now complains:

> "Mr. Stipe made a point that if someone accused you of taking a kickback what would have to be done. As the United States Attorney for eastern Oklahoma, ladies and gentlemen, I believe I can tell you in good faith that if there is only one person that came in and told the FBI that Jimmie Primrose took kickbacks from them, we wouldn't be here today. That isn't the case, and you know it."

Id. at 824. In context these remarks are little more than a reminder to the jury that it had heard more than one witness testify against Primrose. There was no improper vouching.

AFFIRMED.